IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-741

SAFEWAY TRAILS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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TABLE OF CITATIONS.

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SAFEWAY TRAILS, INC.,
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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Safeway Trails, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on September 18, 1979.

OPINIONS BELOW.

The original Decision and Order of the National Labor Relations Board (A1) is reported at 216 N. L. R. B. 951. The first opinion of the United States Court of Appeals for the District of Columbia Circuit (A52) is reported at 546 F. 2d 1038. The Supplemental Decision and Order of the Board on remand from the Court of Appeals (A58) is reported at 233 N. L. R. B. No. 171, 96 L. R. R. M. 1614. An Order Clarifying Supplemental Decision and Order was issued by the Board on March 31, 1978 (A80) and is reported at 233 N. L. R. B. No. 171A, 97 L. R. R. M. 1542. The second opinion of the Court of Appeals (A87) has not yet been officially reported, but is reported at 102 L. R. R. M. 2328.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 18, 1979.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. In light of the identical duty to bargain in good faith which is imposed upon both employers and unions by the National Labor Relations Act, are not an employer's non-coercive communications to its employees during negotiations entitled to the same protection as this Court accorded to comparable extra-bargaining conduct of a union in *NLRB v. Insurance Agents' International Union*, 361 U. S. 477 (1960)?

2. Does not the First Amendment right to free speech, which is implemented in the labor relations context by Section 8(c) of the National Labor Relations Act, preclude a finding that an employer's truthful, non-coercive communications to its employees during negotiations are, by themselves, violative of Section 8(a)(5)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech. . . ."

National Labor Relations Act:

Section 8(a)(5), 29 U. S. C. § 158(a)(5):

> "(a) It shall be an unfair labor practice for an employer-
>
> . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees. . . ."

Section 8(c), 29 U. S. C. § 158(c):

"(c) The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

Section 8(d), 29 U. S. C. § 158(d):

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

STATEMENT.

This petition presents the question whether, during negotiations for a new labor agreement, an employer has the same right that this Court accorded to unions in **NLRB v. Insurance Agents' International Union,** 361 U. S. 477 (1960), to engage in activity away from the bargaining table which is protected by the National Labor Relations Act ("NLRA"), where there is no evidence that such activity reflected a failure of the employer to conduct its at-the-table bargaining in good faith. The United States Court of Appeals for the District of Columbia Circuit refused to

apply the **Insurance Agents'** holding to the company involved here, choosing instead to follow dictum in a decision by the NLRB to the effect that non-coercive speech by the company away from the bargaining table, by itself, could be proof of a refusal to bargain in good faith.

Also at issue is whether the free speech protections of the First Amendment and Section 8(c) of the NLRA will permit inferences drawn from an employer's non-coercive statements to its employees, critical though they may be of the union's conduct of the negotiations, to serve as the sole basis for a finding that the employer's actual bargaining was in bad faith.

In this case the National Labor Relations Board ("Board") initially found that petitioner had committed no violation of its bargaining duty under Section 8(a)(5) of the NLRA when it made statements critical of the union's negotiator. The United States Court of Appeals for the District of Columbia Circuit vacated that decision. Contrary to the principles established by this Court in **Insurance Agents,** the Court of Appeals held that bad faith bargaining can be proved without any showing that the employer's conduct during the actual negotiations was inadequate or even suspect. On remand, the Board, on the basis of the identical record, reversed itself and found that petitioner had indeed violated Section 8(a)(5). The Court of Appeals affirmed *per curiam.*

The sole basis for the Board's ultimate finding was a series of non-coercive away-from-the-table communications from representatives of petitioner to bargaining unit employees. The Board did not consider any evidence of the actual bargaining in reversing its original finding that petitioner's bargaining had not been in bad faith. Rather, it inferred solely from the away-from-the-table communications that petitioner had no intention of reaching agreement with the chief negotiator for its drivers' union,

United Transportation Union, Local No. 1699 ("Union"). The Board held that bad faith could be found, despite the total lack of evidence that petitioner's extra-bargaining communications had any adverse impact on the negotiations or petitioner's participation therein.

This matter had its genesis in negotiations between petitioner and the Union which commenced in February, 1972, for an agreement to take effect upon expiration of the then-existing agreement on March 31, 1972. Petitioner had bargained with the Union or its predecessor for 35 years up to that time and there had been a series of contracts between them. However, agreement on a new contract was not reached, and the Union struck on April 2, 1972, having rejected petitioner's offer to extend the existing contract and to make any changes retroactive to April 1. Such extensions had been utilized in negotiations for previous contracts.

When the strike began, petitioner discontinued its operations. After notice to the Union and the striking employees, petitioner resumed limited operations approximately eight months later, in January, 1973. Nevertheless, negotiations continued on a regular basis from the date of the strike until the end of January, 1974, when they were broken off with the parties hopelessly deadlocked over basic economic issues. There had been 79 formal negotiating sessions up until that time, during which petitioner made numerous proposals and concessions. The strike continued until March, 1975, when it was abandoned by the Union.

The Union filed a charge with the Board on February 20, 1973, which was amended on March 30, 1973, to aver violations of Sections 8(a)(1)[1] and (5) of the NLRA based

1. No separate 8(a)(1) violations were found, and they played no part in this case in the Court of Appeals. *See* note 2 *infra*.

upon petitioner's alleged conduct both at and away from the bargaining table. The Regional Director declined to issue a complaint based on the 8(a)(5) allegations. The Union appealed to the General Counsel, who directed that a complaint should issue alleging that petitioner violated 8(a)(5) by its statements away from the table regarding John Lantz, the Union's chief negotiator.

Significantly, however, the General Counsel specifically excluded, as being without merit, the claim that petitioner's at-the-table conduct was unlawful. At a pre-hearing conference before the Administrative Law Judge ("ALJ"), counsel for all parties agreed that petitioner's conduct in the actual negotiations was not under attack and evidence thereof was not part of the General Counsel's case. This agreement was manifested by the exclusion of all evidence regarding events at the bargaining table and by the discussion in the ALJ's decision concerning the pre-hearing conference and the scope of the allegations against petitioner. (A7-A8)

On June 26, 1974 the ALJ issued his Decision and Recommended Order (A3) dismissing the complaint against petitioner in its entirety. On March 10, 1975, the Board adopted the findings and conclusions of the ALJ *in toto* and dismissed the complaint.

The Union sought review before the Court of Appeals which, on December 9, 1976, in an opinion by Wright, J. for a panel consisting of himself and Bazelon, C. J. and Robinson, J., vacated the Board's Decision and remanded the case for reconsideration. The Court of Appeals based its remand on two grounds. First, the court reversed the determination of the ALJ and the Board that the General Counsel had conceded at the pre-hearing conference that petitioner's conduct at the bargaining table was in good faith. (A53-A55) Second, the court determined that the ALJ and the Board had incorrectly required some evi-

dence of bad faith conduct by petitioner in the actual negotiations—evidence which was wholly lacking—in order to sustain an overall bad faith charge. The court held that, standing alone, an employer's away-from-the-table statements which are critical of the union's spokesman can be sufficient to demonstrate a lack of good faith, and rejected the notion that overall bad faith must be reflected in the employer's conduct at the bargaining table. (A56-A57)

Upon reconsideration, the Board, on December 9, 1977, issued a Supplemental Decision reversing its previous findings and concluding that petitioner had indeed violated Section 8(a)(5). Adopting the Court of Appeals' view of the governing decisional rule and relying solely upon petitioner's non-coercive statements and letters to its employees,[2] the Board found that petitioner had sought to undermine Lantz and had thereby refused to bargain in good faith. In so concluding, the Board relied on petitioner's statements to the effect that Lantz was preventing accord, and applied its own inference that petitioner was attempting thereby to destroy Lantz' credibility and to induce the employees to replace him.

On review, the Court of Appeals, on September 18, 1979, affirmed the Board's Supplemental Decision and clarifying order.[3]

2. The Board in its original decision reviewed each of the communications that were alleged in the complaint to have been coercive and in violation of Section 8(a)(1) of the NLRA. The Board concluded that each was non-coercive and was beyond reproach under 8(a)(1). (A2 n. 1, A32-A41) In its Supplemental Decision, the Board adopted its original rulings in this regard. (A67 n. 8, A71 n. 12)

3. An Order Clarifying Supplemental Decision and Order was issued by the Board on March 31, 1978, denying petitioner's request to toll the accrual of Board-ordered backpay for all periods preceding the Board's Supplemental Decision, in which petitioner for the first time was found to have violated Section 8(a)(5).

REASONS FOR ALLOWING THE WRIT.

The critical error committed by the Court of Appeals and the Board is that they have exalted a Board opinion's dictum, never followed heretofore, over the direct holding of this Court in **NLRB v. Insurance Agents' International Union,** 361 U. S. 477 (1960). In so doing, they have imposed restrictions upon the activities of employers engaged in collective bargaining which were explicitly rejected, with respect to similar union activities, both by this Court and by the Court of Appeals itself in **Insurance Agents.**[4]

The decisions below also overturn long-established principles recognizing and protecting an employer's right to communicate with its employees during negotiations with their bargaining representative. Heretofore, an employer was permitted to inform his employees of the status of negotiations, explain positions previously advanced by him to the union, and present his version of a breakdown in negotiations including criticism of the bargaining strategy and related tactics of the union leadership, without being held in violation of the NLRA. *See* **NLRB v. Movie Star, Inc.,** 361 F. 2d 346, 349 (5th Cir. 1966); **Procter & Gamble Manufacturing Co.,** 160 N. L. R. B. 334, 340 (1966). Indeed, Congress, in Section 8(c) of the NLRA, explicitly validated an employer's "expressing of any views, argument or opinion, or the dissemination thereof . . . if such expression contains no threat of reprisal or force or promise of benefit." Congress thereby forbade the Board from considering such expressions to constitute or be evidence of unfair labor practices. *See* **NLRB v. Gissel Packing Co.,** 395 U. S. 575, 617 (1969).

4. The decision of the Court of Appeals for the District of Columbia Circuit in **Insurance Agents** is reported at 260 F. 2d 736 (D. C. Cir. 1958).

Review and correction of the decisions herein by this Court is imperative, because they represent the resurrection of a view of the Board's role in the bargaining process that was rejected by this Court in **Insurance Agents.** In that case, the Board found that, solely by virtue of a series of away-from-the-table job actions, the union had demonstrated an intent inimical to good faith bargaining. The Board inferred from such harassment of the employer that the union could not have been negotiating in good faith. However, the Board there, as here, considered no evidence whatever of the union's actual conduct at the bargaining table in finding it to have violated Section 8(b)(3).[5] In affirming the refusal of the Court of Appeals for the District of Columbia Circuit to enforce the Board's order, this Court described the inquiry necessary to establish a breach of the bargaining duty. Under the Court's holding, a party's conduct away from the table has significance only insofar as it is reflected by, or reflects upon, deficient or questionable participation in the actual negotiations. Simply stated, where a party's extra-bargaining conduct does not constitute a *per se* violation of the duty to bargain (*e.g.*, unilateral changes in wages or benefits, or direct dealing with bargaining unit employees), such conduct, standing alone, will not sustain an inference or a finding of lack of good faith. 361 U. S. at 490. Certainly, the same rationale which this Court applied in evaluating conduct by a union in **Insurance Agents** should be applied to conduct by an employer which, as in this case, is directly comparable.

5. As this Court noted in **NLRB v. Katz,** 369 U. S. 736, 747 (1962), Section 8(b)(3) is the union counterpart of Section 8(a)(5) which, together with Section 8(d), imposes on employers the duty to bargain in good faith. Hence, the analysis of the bargaining duty set forth in **Insurance Agents** is equally applicable to the conduct required of employers. *See* **NLRB v. Cascade Employers Association, Inc.,** 296 F. 2d 42, 47-48 (9th Cir. 1961).

Although it had initially decided the instant case correctly, the Board, under the prodding of the Court of Appeals, repeated the error for which it was reversed twenty years ago in **Insurance Agents** and found a failure to bargain in good faith, based solely upon petitioner's communications to its employees. No consideration whatever was given to petitioner's performance at the bargaining table, or, for that matter, to that of the Union. Without even attempting to justify this approach in light of the decisional rules established in **Insurance Agents,** the Court of Appeals and the Board on remand seized upon dictum in the Board's decision in **General Electric Co.,** 150 N. L. R. B. 192 (1964), for their sole precedential support.

In **General Electric,** the Board considered the controversial approach to bargaining known as "Boulwareism," which combined a carefully researched employer bargaining proposal, characterized as "firm and fair" and presented to the union on a take-it-or-leave-it basis, with a massive public relations campaign aimed at the employees and the general public for the purpose of "selling" the proposal, much as a consumer product is sold. The communications campaign included criticism of the union and appeals to the employees to pressure the union into accepting the company's proposal. After finding a number of *per se* violations of 8(a)(5), the Board concluded that General Electric had not bargained in good faith based upon this two-pronged approach to the negotiations.

The **General Electric** decision was reviewed by the United States Court of Appeals for the Second Circuit. **NLRB v. General Electric Co.,** 418 F. 2d 736 (2d Cir. 1969), *cert. denied,* 397 U. S. 965 (1970). The court of appeals enforced the Board's order and, citing **Insurance Agents,** based its analysis specifically on this Court's direction to consider the totality of circumstances in evalu-

ating an alleged lack of good faith bargaining. *Id.* at 756. The court recognized that the Board's decision was based on the confluence of the company's at-the-table and away-from-the-table conduct, not solely on the latter, *id.*, and affirmed on the basis of that holding, *id.* at 762.

Clearly, the holding of the Board and the Second Circuit in **General Electric** is consistent with the teaching of this Court in **Insurance Agents,** since the totality of the company's conduct, both at and away-from-the-table, was considered and served as the basis for the finding of overall bad faith bargaining. However, the Board's dictum in **General Electric,** upon which the decisions below in the instant case relied, just as clearly is not consistent with **Insurance Agents.** This dictum suggests that statements by an employer to its employees that are critical of the union can, standing alone, warrant the conclusion that the employer is not bargaining with the union in good faith. **General Electric,** *supra,* 150 NLRB at 194-95. (A90-A91)

But, in **Insurance Agents,** this Court held that union conduct which is potentially far more disruptive of the bargaining process, i.e. sudden, unpredictable job actions, could not, without reference to the actual bargaining, support such a finding.[6] This Court said:

6. In its Supplemental Decision in the instant case, the Board recognized the absence of evidence regarding the bargaining and acknowledged the difficulty posed by such a record for determining a party's good faith. The Board stated: "In most cases, the Board can more accurately evaluate a party's conduct by examining the conduct at the table in light of the conduct away from the table, and vice versa." (A60)

Compounding its error in nevertheless proceeding with its evaluation of petitioner's overall conduct on an abbreviated record, the Board drastically reduced the burden of proof on the General Counsel. Under prior Board decisions, he was required to show affirmatively that petitioner's conduct at the table was at least ambiguous, in order to give weight to the away-from-the-table communications. **Baldwin County Electric Membership Corp.,** 145 N. L. R. B. 1316, 1318 (1964); **Milbin Printing, Inc.,** 218 N. L. R. B.

> "The scope of § 8(b)(3) and the limitations on Board power which were the design of § 8(d) are exceeded, we hold, by inferring a lack of good faith not from any deficiencies of the union's preformance at the bargaining table by reason of its attempted use of economic pressure, but solely and simply because tactics designed to exert economic pressure were employed during the course of the good-faith negotiations."

361 U. S. at 490.[7] There simply must be bargaining-table actions which will support an inference of bad faith.

Aside from the total disregard manifested in the decisions below of this Court's teaching in **Insurance Agents**—that the conduct in the actual negotiations must be the focal point of an overall bad faith claim—the decisions below are even more insidious when one considers the type of conduct on which petitioner's bad faith 8(a)(5) violation was deemed to be founded. As noted, such con-

6. (Cont'd.)
223, 224 (1975), *rev'd on other issues,* 538 F. 2d 496 (2d Cir. 1976). Here, rather than according petitioner a presumption that its conduct at negotiations had been in good faith, as it should have in the absence of evidence to the contrary, the Board treated the negotiations as a "neutral factor, favoring neither sustaining nor dismissing the allegations of the complaint." (A60) This, we submit, is patently improper and violates petitioner's right to due process.

7. In his separate opinion in **Insurance Agents** Justice Frankfurter stated, 361 U. S. at 503:

> "From the respondent's conduct the Board drew the inference that respondent's state of mind was inimical to reaching an agreement, and that inference alone supported its conclusion of a refusal to bargain. The Board's position in this Court proceeded in terms of the relation of conduct such as respondent's to the kind of bargaining required by the statute, without regard to the bearing of such conduct on the proof of good faith revealed by the actual bargaining."

Justice Frankfurter said as to this: "I agree that the position taken by the Board here is not tenable." *Id.* at 504. *See also* footnote 5 of the majority opinion. *Id.* at 482-483.

duct consisted solely of non-coercive communications to employees regarding contract negotiations, communications which the Board has repeatedly sanctioned as being protected by Section 8(c) and the First Amendment. *See, e.g.*, **Stokely-Van Camp, Inc.**, 186 N. L. R. B. 440, 449-50 (1970); **Wantagh Auto Sales, Inc.**, 177 N. L. R. B. 150, 154 (1969); **Procter & Gamble Manufacturing Co.**, *supra*.[8]

In none of petitioner's communications was there even the hint of coercion, *i.e.*, a promise of benefit or threat of harm. Each represented nothing more than an expression of petitioner's view of the negotiations and its view of the reason for the stalemate. More importantly, as far as the Board knew, without examining the negotiations, everything said by petitioner about Lantz and his blame for the impasse and lack of an agreement was absolutely accurate. How, then, can petitioner be held to have bargained in bad faith when, in truthful, non-coercive terms, it advised its

8. Merely reciting the five statements upon which the Board and Court of Appeals placed principal reliance demonstrates the alarming portent of their decisions.

The first was a letter to the drivers transmitting a contract proposal previously submitted to the Union but rejected by it. The supposedly opprobrious comment in the letter was that "the time for action . . . is past due" and that each employee should "act in the interest of [his] own personal welfare and aid in getting an early settlement." (A65, A66; A91) The second was contained in a letter to a number of senior drivers and noted how puzzling it was for long-term employees to have permitted a seven-year employee, Lantz, to take over. The letter asked the drivers to give the contract offer "serious consideration and then let Lantz know how you feel as a body of men." (A67; A91-A92) The third was an off-the-cuff remark by petitioner's president to the wife of a striking driver in response to her questioning. The president stated his belief that the dispute could be settled with any drivers other than Lantz. (A67-A68; A92) The fourth was a remark made by the president to a senior driver to the effect that he could not understand why the older men could not do something to get the strike settled. (A68; A92) The last was a comment on the picket line to several employees by petitioner's vice president to the effect that he felt that the strikers were following the wrong man. (A68; A92)

employees of its perception of the cause of the strike and bargaining stalemate and virtually pleaded with them to talk with their bargaining representative about it?

If the First Amendment and Section 8(c) do not protect such remarks, something is profoundly wrong. Clearly, however, they do offer such protection. As the Court of Appeals for the Second Circuit observed in **NLRB v. General Electric Co.**, *supra*, 418 F. 2d at 756: "In circumstances such as these, the interest in free speech and informed choice must prevail over the slight possibility that the representatives' positions might be undermined. . . ." In order to insure proper administration of the NLRA and proper Board oversight of the collective bargaining process, and to safeguard the integrity of the free speech guarantees of the First Amendment and Section 8(c), this Court must review and correct the patently misconceived decisions below.

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should issue to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Dated: November 8, 1979.

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-741

SAFEWAY TRAILS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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INDEX TO APPENDIX

Appendix.

216 NLRB No. 171

FKP
D—9686
Washington, D. C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 5—CA—5975

SAFEWAY TRAILS, INC.
and
UNITED TRANSPORTATION UNION,
LOCAL NO. 1699

DECISION AND ORDER

On June 26, 1974, Administrative Law Judge Melvin J. Welles issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and

has decided to affirm the rulings, findings, and conclusions [1] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C. March 10, 1975.

John H. Fanning, Member

Ralph E. Kennedy, Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

1. We would not find that Paul Miller's statement that Respondent would never sign a contract with the Union violated Sec. 8(a)(1) of the Act. Miller was in no way connected with the contract negotiations and had no special knowledge of the negotiations. At the time he made the statement that allegedly violated the Act, Miller had relinquished all supervisory functions and was driving a bus. Under these circumstances, we find that Miller's statement was noncoercive and did not violate the Act.

JD—452-74
Washington, D. C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

Case No. 5-CA-5975

SAFEWAY TRAILS, INC.
and
UNITED TRANSPORTATION UNION,
LOCAL NO. 1699

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Respondent.

DECISION

STATEMENT OF THE CASE

MELVIN J. WELLES, *Administrative Law Judge:* This case was heard at Washington, D. C., on various dates from February 19 through February 27, 1974, based on charges filed February 19, 1973, and amended March 30, 1973, and a complaint issued January 15, 1974, alleging that Respondent violated Section 8(a)(1) and (5) of the Act. The General Counsel, the Charging Party, and Respondent have filed briefs. In addition, the Respondent filed a "Motion to Strike Portions of Briefs to Administrative Law Judge," and the General Counsel and the Charging Party have filed memoranda in opposition to Respondent's motion. I deem the motion and the memoranda as constituting supplemental briefs, accept them as such, and will resolve the questions raised thereby, as well as in a subsequent letter from the Charging Party, in this Decision.

Upon the entire record in the case,[1] including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT AND THE LABOR ORGANIZATION INVOLVED

Respondent, a Maryland corporation with its principal office in Washington, D. C., is engaged in the interstate motor coach transportation business at its terminals in various cities along the east coast of the United States. During 1973 it derived gross revenues in excess of $50,000 from the interstate transportation of passengers and freight. I find, as Respondent admits, that it is engaged in commerce within the meaning of Section 2(6) and (7) of

1. The Joint Motion to Correct Transcript filed by the General Counsel and the Respondent is hereby granted.

the Act. United Transportation Union, Local No. 1699, the Charging Party, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Issues—Some Preliminary Discussion*

The issues as framed by the pleadings are, first, whether Respondent violated Section 8(a)(5) of the Act in nine specific respects set forth in Paragraph 8 of the complaint (as amended at the hearing), second, whether Respondent violated Section 8(a)(1) of the Act by the acts set forth in Paragraph 8 of the complaint, and in eight other specific respects set forth in Paragraph 9 of the complaint (as amended at the hearing), and third, whether a strike that began April 2, 1972, as an economic strike was prolonged, and converted into an unfair labor practice strike, by the unfair labor practices alleged in Paragraphs 8 and 9 of the complaint.

The parties, however, are not in full agreement as to precisely what are the issues in this case. The General Counsel's brief states the issues as follows:

> 1. Whether Respondent disparaged and discredited the Union's Chief Negotiator John Lantz and the Union in violation of its duty to bargain in good faith by means of a series of written and oral communications with strikers and other conduct?
>
> 2. Whether Respondent coerced and restrained employees in the exercise of their Section 7 rights by a series of conduct undertaken in connection with a back-to-work movement?
>
> 3. Whether Respondent by other conduct coerced and restrained employees in the exercise of their Section 7 rights?

4. Whether the effect of Respondent's acts was to convert a strike, economic in its origin, to a strike, a purpose of which was to protest the Respondent's unfair labor practices?

Respondent's brief states the issues as follows:

1. Whether Counsel for the General Counsel has proved, by a preponderance of the evidence, that the Company violated Sections 8(a)(5) and (1) of the Act by seeking to undermine the authority of John Lantz, the Union's bargaining committee chairman, by negotiating directly with certain striking employees.

2. Whether Counsel for the General Counsel has proved, by a preponderance of the evidence, that the Company interfered with, restrained and coerced certain of its employees in the exercise of their rights under Section 7 of the Act.

3. Whether, assuming that any unfair labor practices occurred, Counsel for the General Counsel has proved, by a preponderance of the evidence, that the strike, which began on April 2, 1972 and is continuing to date, was converted to an unfair labor practice strike on or before December 14, 1972.

And the Union's brief states the issues as follows:

(1) Whether Respondent refused and continues to refuse to bargain in good faith.

(2) Whether Respondent's program, developed during the first few weeks of the strike, to undermine Lantz, the Chairman of the UTU negotiating committee, in an effort to induce its striking employees "to boot Lantz out" and to compel the UTU International to take over the bargaining negotiations is inconsistent with its obligation to engage in an earnest effort through the process of collective bargaining to seek a basis for an agreement, all in violation of Section 8(a)(5) of the Act.

(3) Whether Respondent by its conduct in carrying out its program to disparage, discredit and destroy the UTU bargaining committee, particularly its Chairman Lantz, coerced and restrained employees in the exercise of their Section 7 rights to bargain collectively through representatives of their own choosing.

(4) Whether Respondent's actions in violation of Section 8(a)(5) and 8(a)(1), as described, converted the strike into an unfair labor practices strike.

As can be seen, the General Counsel's and Respondent's statements of the issues do not materially differ. But the General Counsel's brief clearly takes the approach that Respondent's entire campaign of away-from-the-table conduct was "inconsistent with Respondent's obligation to bargain in good faith," and was "destructive of good faith negotiations." The Union specifically takes this position in its statement of the issues, as well as in its brief. The General Counsel and the Union, in other words, seek a finding that the specific items alleged in Section 8 of the complaint, viewed in conjunction with other conduct not specifically alleged as violative of the Act either because it occurred prior to the 10(b) period, or was not in and of itself deemed to constitute a violation, tainted Respondent's entire bargaining, demonstrating that Respondent had no intention of reaching agreement with the Union.

Although, for reasons that will appear fully hereafter, I do not believe that the General Counsel or the Union has shown in fact or in law a case of "bad faith bargaining," I do not in any event agree with their position that Respond-

ent's "at-the-table" bargaining is in issue here. Based on a prehearing conference held in this case, various discussions and positions at the hearing, and the way the entire proceeding was tried, I am satisfied that the at-the-table bargaining not only was *not* under attack, it was conceded, at least by the General Counsel, that the bargaining was conducted in good faith. That was my understanding at the hearing,[2] and I see no reason to change my view. Despite that view, I shall consider herein whether the away-from-the-table conduct was so pernicious as to warrant a conclusion that Respondent could not have been bargaining in good faith at the table no matter what was shown to have taken place during the bargaining sessions.

Before considering the Section 8(a)(5) allegation in the broad sense advocated by the General Counsel and the Union, I shall discuss *seriatim* the complaint's allegations, lettering the 8(a)(5) and 8(a)(1) allegations, respectively, in conformity with Paragraphs 8 and 9 of the complaint.[3] I choose this method of proceeding partly because

2. Thus, I stated at the hearing "We're not getting into good or bad faith in bargaining and that's the issue we have taken out of the case." At another point, after counsel for Respondent took exception to a statement by counsel for the Union that he did not "recall a concession that there was good faith bargaining," I stated "That is correct. For purposes of this case and for purposes of my decision, I can only assume good faith bargaining in the bargaining sessions that occurred." The General Counsel did not appear to disagree, at the time, with my view of what was not at issue in the case, and my view that good faith at-the-table bargaining was conceded.

3. The parties are also in dispute on a number of subsidiary matters, such as whether I should take official notice of a transcript in another proceeding, in 1957, involving the Company and a predecessor union of the Charging Party and of a District Court decision involving the pension plan, whether I should receive in evidence (having rejected it at the hearing) the Regional Director's original disposition of the charges herein and the General Counsel's resolution of the Union's appeal from the Regional Director's determination, and whether, as to certain contentions in both the General

there are factual questions involved as to certain of the allegations, partly because it is difficult to discuss them in a broad context before considering them one by one, and partly because one must begin somewhere.

B. *Background and Chronology*

The Union has represented the Company's drivers for about 37 years, and a series of contracts, the last from April 1, 1969 to March 31, 1972, have existed. Negotiations for a new contract began February 22, 1972. Marvin Walsh, President of the Company, and its chief negotiator for the last 30 years, was also its chief negotiator during the bargaining sessions that began at that time. The Union's chief negotiator at the 1972-1974 bargaining sessions was John Lantz. Various company and union officials assisted Walsh and Lantz at the different sessions. Beginning with the April 1, 1972, meeting, the 18th between the parties, a Federal Mediator attended and assisted at the bargaining sessions. A strike, which was still continuing at the time of the hearing, February 1974, began April 2, 1972.

On April 5, Walsh sent a letter to all employees,[4] with copies to the Union's negotiating committee and the medi-

3. (Cont'd.)
Counsel's and Union's briefs, they are embraced by the pleadings, or alternatively were fully litigated so as to furnish a basis for either a specific unfair labor practice finding or for background purposes in connection with other allegations clearly embraced by the complaint. With the exception of my exclusion of the documents relating to the Union's appeal from the Regional Director's determination, as to which I hereby reaffirm my ruling, I will consider these and related questions as the need and occasion arises in connection with the principal issues herein, with any specific matter not explicitly ruled upon subsumed in the conclusions reached and the rationale therefor.

4. The Company ceased to operate with the commencement of the strike, resuming operations about January 13, 1973.

ator, stating, in part, that two-thirds of the 18 meetings "were meaningless, or at least fruitless, because the Union Chairman was not prepared, did not have his full committee, and met either by himself or with one member most of the time," and that the "Chairman insisted upon ridiculous demands . . . which made it impossible to reach an agreement."

Because, as noted above, the gravamen of the 8(a)(5) portion of the complaint is the "campaign to discredit and disparage union chief negotiator John Lantz," and because five of the nine allegations in that portion of the complaint concern Walsh's assertions, by letters, telephone calls, and personal conversations, concerning Lantz' inadequacies, precisely what occurred at the first meeting of February 22, 1972, and the truth or falsity of the charges made on April 5, and in other communications to all or some employees on various dates between April 5 and August 24, 1972,[5] were placed in issue by the parties.

There is no question but that Lantz' role during negotiations was anathema to the Company, or at least to Walsh, its president and chief negotiator. This is plainly evidenced by the April 5, letter, by the other letters prior to August 24, and by the Company's own resume of the April 28, 1972, meeting (of which more later). I will not burden this decision with excessive details of the other letters. It suffices to mention that in a May 4 letter to the Federal mediator, with copies to the U. T. U.'s International president and vice-president, to all employees, and to the Union's bargaining committee, Walsh referred to Lantz as completely lacking in "responsibility and sincerity," and said that it was "high time the UTU Grand Lodge . . . assumes its responsibility for the people they represent . . ."; (2) in a communique to all employees on May 11, Walsh stated that Lantz had misrepresented to

5. The date of the first specific allegation in the complaint.

the membership the number of items in dispute, and not presented to the employees various proposals that the Company had made in the two meetings prior to the strike; and (3) Walsh called James Gore, a former president of the Union, in June 1972, told him that he could not get along with Lantz, that Lantz changed the proposals every time they had a meeting, and that Lantz was not telling the membership everything that was going on.

I do not, however, propose to enter the thicket of determining whether Walsh's allegations concerning Lantz in the various letters to the International, to the Federal Mediator, and to the employees were "justified." In the first place, unless translated into a refusal to meet with Lantz, that is, unless the allegations by Walsh were being urged as a reason for any refusals to meet, no purpose would be served, *vis-a-vis* the complaint's refusal to bargain allegations, by deciding whether they were accurate charges, and if so, whether they would constitute a legitimate basis for refusing to meet with the Union as long as Lantz was the Union's chief negotiator.[6]

It is true, as the General Counsel and the Union urge, that a demonstrable falsity in the allegations contained would have a bearing on the good faith or bona fides of Walsh in sending the letters, but only if, in my opinion, an inference could be drawn that the allegations were reckless, in total disregard of the true facts, and accordingly did not even represent a legitimate, even though erroneous, view of Lantz' role in the conduct of the negotiations.

The situation here scarcely warrants such a conclusion or inference. For example, the Company defends Walsh's allegation that Lantz was "unprepared," at the first meet-

6. Perhaps because the allegations could obviously not furnish a basis for refusing to meet at all, see, e.g. *N. L. R. B. v. ILGWU (Slate Belt)*, 274 F. 2d 376 there was no such refusal.

ing by testimony to demonstrate that he presented no written proposals at that meeting, although during the many prior negotiations between the parties, with different negotiators for the Union, proposals in writing had been presented at the outset of negotiations. The General Counsel countered by presenting evidence that Lantz had in fact prepared lengthy written proposals, indeed, completely rewriting and renumbering the provisions of the old, expiring contract.

As I view all the evidence, however, I am not convinced that Lantz actually presented to the Company at that first meeting more than a single proposal, involving leaves of absence. I do not conclude that Lantz was in fact unprepared; I do rather believe that the Company's statement that he was not was neither reckless nor in total disregard of the facts. Many of Walsh's criticisms of Lantz were pejorative in nature, e.g., that Lantz was lacking in "responsibility and sincerity." It is obviously a futile task to attempt to determine whether that kind of an accusation is true or false, or whether it represents the honest belief of Walsh and other company officials. But the fact that this particular accusation was made in a letter to the Federal Mediator, with copies sent to the International's president, at least suggests that it was not said for the purpose of avoiding reaching agreement.

By way of further "background," the Union vigorously, and the General Counsel by reference, urge that I consider Walsh's conduct in earlier negotiations, in the early and middle 1950's, and in 1963, between this Respondent and the Union, and between another company for which Walsh had negotiated, Trailways of New England, and the Union,[7] which the Union contends shows

7. I did not permit any testimony with respect to this latter conduct, a ruling I hereby reaffirm.

that Walsh "has been prone to subvert the process [of bargaining] *by negotiating in, around, and through the* committee . . . ." The Union also requests that I take official notice of testimony by Walsh in a representation case in 1957 involving the Company and a predecessor union to the Charging Party. In effect, they argue that Walsh's *modus operandi* in prior bargaining demonstrates that he had a predilection for bypassing the Union's chosen negotiators, and bargaining directly with employees, or union officials, away from the regular scheduled bargaining sessions.

In my view, this is a two-edged sword. The fact that Walsh did operate in this fashion, without objection either expressed to him or manifested by any charges filed with the Board, could well be said to have established, by mutual consent, a *modus operandi* of helping to achieve a successful resolution of bargaining problems by means that, albeit unusual, and that perhaps might be indicia of bad faith if engaged in by one of the parties without the express or tacit consent by the other, were legitimatized by custom and usage. Although it is true that an obviously unlawful course of conduct does not lose its illegality merely because the victim has not complained about it,[8] the earlier conduct does not, in logic, taint, or make unlawful, present conduct that, standing alone, would be legitimate. Even assuming *arguendo* that Walsh's previous bargaining negotiations and techniques would, if brought to the Board at the time by timely charges, have been found to have violated the statutory requirement of good faith bargaining, the position of the Union and the General Counsel here would be weakened, rather than

8. E.g., it could not be argued by a company that because it had fired dozens of employees for union activity in past years, without a complaint, or charges filed by the Union, a present discharge for union activity was lawful.

strengthened, by the fact that those techniques were not challenged.

As to the testimony of Walsh in Case No. 4-RC-3490, in 1957, I do take notice of it, as it is part of an official Board record.[9] Walsh testified as follows: "My experience [in previous bargaining] was I got it settled, because why. Because in the hotel room in Springfield, Massachusetts, there wasn't only the committee there. Most of the mechanics were there, and it was in a suite. There were so many people in the room that we settled it at five a.m. in the morning. It was not a committee action. It was more or less of a membership action. There were only forty-one people involved in that unit, and that is the way we got it settled. And that did not take place on May 9, 1957, or I think we would have been able to have gotten that one settled."

There is no basis whatsoever for concluding that Walsh's conduct in 1955 was in any way unlawful, or in bad faith. Even if Walsh at that time suggested the method which "got it settled," the then union committee might well have been in full agreement to proceed in the manner indicated. Indeed, the committee may have invited Walsh to come to the suite. Walsh also testified in the instant hearing that he negotiated a settlement at one point after being invited by the Union's committee to a meeting with "as many members present as we could," and "the Chairman and the entire committee were there." The very fact that "the Chairman and the entire committee were there" suggests their willingness to proceed in that way, rather than any "by-passing" of the Union's committee by Walsh. In short, none of the testimony proffered in this connection could furnish a basis for concluding that any present conduct which standing along appeared lawful and legitimate became invidious and unlawful when viewed against Walsh's earlier negotiations for this or any other company.

9. Because of what follows, I pretermit any opinion as to the fairness to Respondent of having my attention to this testimony raised in the post-hearing briefs, rather than at the hearing.

I turn now to a consideration of the specific allegations of the complaint, lettered, as indicated above, as in the complaint.

C. *The Refusal to Bargain Allegations*

(a) "On or about October 1972 . . . Marvin E. Walsh told striking employees in telephone conversations to their homes that he would not sign a contract with the union because he would not deal with John Lantz."

This allegation is based on the testimony of John Mathias and his wife. Mathias testified that Walsh called him, asked when he was going to return to work, stating that he could return "the next day." Mathias indicated that he would not return until a contract was signed, and Walsh responded "I can't do that because I cannot sit down and negotiate with John Lantz. . . ." Mrs. Mathias testified that she was, at her husband's request, listening on the extension, and has Walsh saying he could not "negotiate with somebody with all the whiskers or beard on his face." (Lantz does have a beard). Walsh did not deny that he phoned Mathias. He testified that he did so because the terminal manager informed him that Mathias wanted to talk to him, but did not want to cross the picket line to do so in Walsh's office. He denied saying he would not bargain with Lantz, or that he told Mathias he could return to work the next day.

Both the General Counsel and the Company view the testimony of Walsh and Mathias (as supported by Mrs.

Mathias) as in sharp conflict, and each presents cogent reasons why the other's witness should be discredited. Thus, Respondent contends that Walsh could not conceivably have told Mathias, in October 1972, that he could return to work "the next day," because the Company was not in operation, and did not resume operations until January 13, 1973, and that Walsh had no reason for saying he would not bargain or sign a contract with Lantz, as he had met with Lantz 40 or more times by then, and in fact subsequently met with Lantz another 30 to 40 times. The General Counsel argues that Walsh's offer to Mathias to come back to work was essentially a statement that "he could have the men back to work as soon as a contract was signed." The General Counsel also asserts that Mrs. Mathias' testimony concerning Walsh's remark about not being able to negotiate with "somebody with all the whiskers or beard on his face," is "particularly convincing" because she did not know who Lantz was, or what he looked like, and it was therefore the type of statement that must have "stuck out in her mind."

In my view, Respondent's argument is somewhat more convincing, for the General Counsel's depends on speculating that Mathias' testimony concerning the Walsh offer to Mathias to return to work the "next day" meant something other than the plain words used by Mathias. I also do not believe that Walsh could flatly have said he would not bargain and would not sign a contract with Lantz. More likely, and this too is speculation on my part, but speculation based on the letters sent by Walsh, and the resume of the April 28 bargaining session (discussed below), by saying something to the effect of "I can't [not 'I won't'] negotiate with Lantz," or with "somebody with all the whiskers or beard on his face," Walsh was denoting that it was difficult, that he was having a "rough time,"

bargaining with Lantz. Mrs. Mathias' testimony in fact used the word "can't" in describing what Walsh said.

In all the circumstances described above, I do not find any violation of the Act in connection with Walsh's call to Mathias in October 1972.

(b) "On or about December 14, 1972, Respondent caused to be sent to the homes of a large number of striking employees a letter over the signature of Marvin E. Walsh disparaging John Lantz by accusing him of not bargaining in the best interest of the Union's members, and urging them to by-pass or oust Lantz and deal directly with Respondent."

The letter in question reads as follows:

Dear Operator

It is almost Christmas and the strike is now well into its ninth month. If you will carefully read the Company's last and final offer good until December 31st, you can see it is an extremely good offer taking in consideration the milage [sic] rate, cost of livig [sic], holidays and funded pension plan.

It is very puzzling to me why the operators, who have been with this Company so many years, would allow a Chairman with a 1967 seniority date to take over and control the operators as he has done.

It would be my recommendation that you give this offer serious consideration and then let Lantz know how you feel as a body of men as this could adversely affect the future welfare of you and your families.

I am extremely sorry the strike occurred as it has never been my intention to do anything to the older

operators who have worked so many loyal years for Safeway Trails.

My best wishes to you and your families for a Happy Holiday Season.

Very truly yours,
MARVIN E. WALSH

Leading up to the sending of the December 14 letter was a letter from Walsh to Lantz (with copies to all employees, the Federal Mediator, and UTU International President Chesser) with a "complete contract document," and a summary of the "improvements made" therein, representing the Company's "final offer," and indicating its availability until December 31, 1972. This letter also stated Walsh's availability "to answer any questions you [Lantz] or the operators may have during the meantime." Apparently as a result of this invitation, a number of employees did call or speak personally with Walsh. On December 13, 1972, striker Richard Shortt pointed out an apparent omission in one provision of the contract. Walsh agreed with Shortt that the omission was a mistake, and Company official McGraw then typed up a change to correct that mistake.[10]

10. The General Counsel asserts that this latter incident constituted "direct bargaining with . . . employees," and a "clear by-passing of the employees' representative," in violation of Section 8(a)(5) of the Act, which "is further evidence of Respondent's bad faith." Aside from the fact that there is no allegation in the complaint respecting this particular situation, I do not regard it as "an offer directly to employees" or as "by-passing the employees' representative" in any meaningful sense. A mistake was pointed out to Walsh by an employee, and the Company corrected it. I find no violation based on this occurrence.

As to the December 14 letter, sent to 26 "senior employees," Walsh testified that it stemmed from numerous calls from striking drivers to get information about the negotiations, and that most of the calls were from "senior men." It is true, as the General Counsel asserts, that the letter was sent only to the senior men, many of whom had not sought information from Walsh, and was not sent to some who had called, but were not senior. This does suggest that Walsh was appealing to the men who had "the most at stake," and, indeed, the letter refers to the operators who "have been with this Company so many years." But there is nothing *per se* wrong with writing to a specific group of strikers, certainly not because they may be the ones most "amenable" to the appeal.

Nor can I read the letter, as a whole, as any more than an attempt by Walsh to get the recipients to induce Lantz to accept the Company's December 7 offer. The paragraph of the letter stating that it was "puzzling" to Walsh why the senior operators "would allow a Chairman with a 1967 seniority date to take over and control the operators as he has done," might, read in insolation [sic], suggest that Walsh was seeking the [sic] have the employees "boot Lantz out," but the next paragraph, with Walsh's "recommendation," that the employees "let Lantz know" how they feel about the offer, negates such an implication.

The cases cited by the General Counsel to support his position that the December 14 letter violated Section 8(a)(5) of the Act would not do so even were the letter to be read as an attempt to persuade the recipients to "boot Lantz out." Thus, in *Plastiline, Inc.*, 190 NLRB 365, 375, affirmed, 79 LRRM 2592 (C. A. 4), a violation was found based on attempts to persuade the employees to reject the Union, file a decertification petition, select an independent union, and accept an agreement with the independent

union, as well as the Company's withdrawal of recognition from the Union. Nothing in the instant situation, or, indeed, in the entire case, resembles *Plastiline*. In *Wire Products Manufacturing Co.*, 198 NLRB No. 190, mofified [sic] 484 F. 2d 760 (C. A. 7), heavily relied upon by the General Counsel as to other allegations herein as well as this one, the Board found a violation based on part on the Company's telling an employee that "if the local plant committee repudiated in [sic] the Union's agent the local plant committee would negotiate its own contract." But the Company also (and *Wire Products* involved a lockout situation) told employees that it *would not bargain* with the Union, as well as in other ways seeking to undermine the Union. The December 14 letter here is not a statement that the Company would bargain for a contract only if Lantz was repudiated. And *Wire Products* does not stand for the proposition that any attempt to get union members to "boot out" a particular negotiator violates the Act. I therefore dismiss this allegation of the complaint.

(c) "In or about late January 1973, . . . Paul Miller told striking employees at Respondent's New York, New York terminal that Respondent would never sign a contract with the Union."

In late January 1973, after the Company resumed operations, according to strikers Robert Johnson and Frank Wetzel, they had a dicussion with Paul Miller[11] while picketing at the New York City Port Authority terminal, in which Miller said that "Marvin'll never sign a contract with the Union." Johnson asked whether Walsh was quitting, and Miller responded "No, he is just never going to sign a contract with the UTU." Miller denied this conversation. Despite that denial, based on my observation

11. His status at the time is discussed hereafter.

of the witnesses, I am satisfied that the conversation occurred as testified to by Johnson and Wetzel.[12] Miller was probably not in any position to know the precise status of negotiations, and therefore, was giving his personal opinion, rather than stating a fact, or something he had heard from Walsh or other high management officials. If, however, he was a supervisor, as the General Counsel contends, the statement would nonetheless constitute a violation of Section 8(a)(1) of the Act, not 8(a)(5), in my view, for I do not believe the employers would regard his statement as coming from Walsh, and it clearly did not represent Company policy).

As to whether he was a supervisor, until the Company resumed operations on January 13, 1973, he was concededly a supervisor within the meaning of the Act. On January 15, 1973, however, Miller was offered a driving job, as were many other "supervisors," being told that he could return to his supervisory position any time he wanted, but that it was a permanent transfer if Miller so desired. He accepted the transfer, and was performing driving work at the time of the incident in question, returning to his former supervisory position on April 16, 1973, at his own request, because he was "bored with driving." Although from January 15 to April 15, Miller was technically not a supervisor,[13] the fact is that his supervisory position remained open to him on request, that no one other than Miller himself was informed that his status was changed, and that it is unlikely that the striking employees would view him as anything other than a supervisor (which he had been) performing non-supervisory

12. I have taken into consideration Respondent's arguments as to why I should credit Miller, and do not find them persuasive.

13. Cf., however, *I. B. E. W. (Illinois Bell Telephone Co.)*, 192 NLRB No. 17, reversed 83 LRRM 2582 (C. A. D. C.).

work during the strike, particularly with the Company so recently having resumed operations, and necessarily relying on many supervisors to do the driving. I find, accordingly, that Miller must have been viewed as a supervisor by the employees, and that Respondent is responsible for his conduct.

This is, however, the only violation of the Act found herein. As already indicated, and as more fully discussed in E below, the Company at-the-table bargaining was not put in issue, nor do I conclude that the evidence shows "bad faith" by the Company, let alone any determination not to sign a contract with the Union. Thus, the single statement, not reflecting Company policy, although technically violative of the Act, made by someone performing rank and file work at the time, even though, as I have found, he must have been regarded as a supervisor by the employees, does not, in my opinion, have sufficient impact to require any remedy. For a virtually identical holding by the Board, see *Procter & Gamble Mfg. Co.*, 160 NLRB 334, 339, fn. 8.

(d) "On or about February 28, 1973, Marvin E. Walsh disparaged and discredited John Lantz in telephone calls to strikers' homes by stating that Respondent could reach an agreement with any negotiating committee the Union designated so long as John Lantz was eliminated as a member of that committee."

After receiving some correspondence concerning insurance,[14] Mrs. Sarah Stevens, the wife of striking employee John Stevens, called Walsh at his home to inquire whether her husband was terminated. Walsh assured

14. An allegation respecting this correspondence is discussed in (b) below.

her that he was not, and could come back to work at any time. According to her, she asked Walsh if the contract would ever be settled. He replied "I really don't know. But I can tell you how it can be settled. I will meet with any three men on the roster other than John, other than John Lantz, and I will guarantee then I can have this contract settled within 2 to 3 hours." Walsh's testimony is somewhat different with respect to the words allegedly violative of the Act. As he put it, after Mrs. Stevens asked why the strike wasn't settled, adding that she "could settle this strike better than you and John Lantz are settling it," he replied "There's a possibility that you could, if you could pick three people that you would name and pick three other different people from the company, those people might be able to sit down and settle it, but I promise you one thing, lady, whoever you are, I have given this thing honest and sincere effort. I have never worked so hard in my life to try and settle a strike."

I believe that Mrs. Stevens would be much more likely to remember the substance of her one conversation with Walsh than Walsh, who admittedly spoke to many employees during the strike, by phone and otherwise. But I find no violation in Walsh's expressed view, to a question by Mrs. Stevens, who had called Walsh, as to whether the contract would ever be settled, that it could be "in two or three hours" without Lantz. The full context of the conversation makes clear that this was not tantamount to saying that the Company would not bargain with Lantz, for, as Mrs. Stevens testified, Walsh first responded to her question with "I really don't know." Again, there is nothing wrong, in my opinion, with Walsh having and expressing the view that it would have been much easier to reach an agreement without Lantz as the chief negotiator. Accordingly, I find no violation as to this incident.

(e) "In or about March 1973 . . . Marvin E. Walsh, in telephone conversations with strikers at their homes, made remarks that disparaged and discredited John Lantz by suggesting to Union members that Lantz would cost them their jobs and by urging Union members to get rid of or do something about Lantz."

Employee Kenneth Day testified to a conversation with Walsh on the telephone, somewhere in late January, with Walsh saying, that he "couldn't understand why that the men were letting John Lantz keep them out in the streets and that he couldn't understand why that they couldn't do something to get this thing settled, that the older men get together and do something to get this settled." Day went on to testify that Walsh stated "It just might cost you your job unless something is done about it." Walsh denied the substance of Day's testimony although agreeing that he had several conversations with Day.

I cannot believe that Walsh made the remark about costing Day "his job." It is not in keeping with any of the conduct of Walsh or any other Company official, even accepting all allegations as fact. Furthermore, Day virtually "threw away" this last remark, after, as Respondent appropriately puts it in its brief, "some prodding by the . . . General Counsel." The other portion of the statement testified to by Day is in keeping with the general tenor of Walsh's statement, letters and communiques, and comports with Walsh having sent the December 14 letter to the "senior men." But, as with that letter, I view this statement as no more than an expression of his view that the men should go to Lantz to get him to accept the Company's offer made the previous month. As so construed,

I find no violation of the Act in Walsh's conversation with Day in June 1973.

(f) "On or about March 27, 1973. L. Hilton Warwick disparaged and discredited John Lantz in conversation with striking employees at Respondent's Philadelphia, Pennsylvania, terminal, by accusing Lantz of being unreliable and blamed him for the loss of the strikers' seniority."

About March 30, 1973, according to strikers Edward Vincent and Donald Teesdale, Hilton Warwick, Company vice president, asked them when they were going to return to work. They replied that they would return when the contract was settled and the strike was over. Warwick then said that they were "following the wrong man," and "following the wrong pied piper," and therefore would never return to work. Warwick also stated to Vincent that he was "sorry to see him losing his years of service and seniority." Warwick admitted having the conversation with Vincent and Teesdale, placing it, apparently accurately, on March 23, 1973. He denied having made any statements about Lantz, or having said anything about losing seniority or years of service.

It seems likely that in the course of a conversation about strikers returning to work Warwick may well have indicated that long service employees such as Vincent would lose their years of service by remaining out on strike —in the sense that, the Company already having resumed operations, there might be no openings left for employees who remained out much longer. Particularly because the evidence establishes that no returning striker lost any seniority, I cannot believe that Vice President Warwick would threaten such a loss. I do conclude that Warwick

said something to the effect that they were "following the wrong man," but do not regard that remark as coercive, or as indicating any Company refusal to bargain with, or reach agreement with, Lantz. My reasoning in this respect is the same as already set forth above with respect to the statement by Walsh to Mrs. Stevens, and the December 14 letter to the "senior men." Accordingly, I find no violation as to this allegation of the complaint.

(g) "On or about April 28, 1973, Sam Athey disparaged and discredited John Lantz in a conversation with a striking employee at the latter's home, by accusing Lants [sic] of being a radical and by indicating that the Respondent would not deal with him and by urging the employee to return to work."

Employee Richard Gayhart testified that Sam Athey told him that Walsh considered Lantz to be "a radical," and that Gayhart should consider returning to work.[15] Based on my observation of the witnesses, I find that Athey did say what Gayhart testified he said.

Athey, like Miller, transferred from a supervisory position (Supervisor of Safety and Training) to an operator's position two days after the Company resumed operations. For reasons stated with respect to Miller, I would find Respondent responsible for any conduct by Athey during this period, even though Athey, unlike Miller, ultimately decided to remain an operator. However, I find nothing wrong, nothing violative of the Act, in Athey saying that Walsh said Lantz was a radical, nor do I detect any sug-

15. The General Counsel's brief has Athey saying, in addition, that Respondent would not deal with Lantz. Apparently, the General Counsel took this from the complaint's allegation rather than from the testimony, for I find no such statement in Gayhart's testimony.

gestion of a threat, or coercion, or a promise of benefit, in Athey's advising Gayhart to "consider returning to work," particularly in view of the fact that the entire conversation took place in a context of Athey asking Gayhart to do some plowing for him on land owned by Athey, apparently adjacent to Gayhart's property. Accordingly, I find no violation as to this incident.

(h) "In or about February or March 1973 . . . William Basinger stated in conversations with striking employees . . . that those who would abandon the strike and return to work would receive wages and fringe benefits in excess of what Respondent was then offering the Union in contract negotiations."

Employee Kenneth Day testified to several conversations with Company Official William Basinger, some time in February or March 1973, in which Basinger asked Day why he had not come back to work, that he should not wait too longer [sic] or he might be "left out in the cold," that "the Company was bearing the full cost of the insurance," and that insurance would start on the first of the month following his return to work. Aside from the "left out in the cold" statement, and that the Company was bearing the full cost of the insurance, Basinger confirmed the conversations, one over the phone, and the other at a Masonic Hall.[16]

Assuming that Basinger did use "left out in the cold" to his "personal friend" Day, I agree with Respondent that this was neither meant, nor could have been construed by Day, as a threat, but rather as a colloquial way of indicating that once the Company hired all the people it needed,

16. As Day testified, he and Basinger were "personal friends."

there would be no room left for anyone else. The technical failure to tell Day that he would still have "*Laidlaw* rights," in the context of this one-to-one conversation between friends, I do not regard as violative of the Act.

As to the alleged statement by Basinger that the Company was bearing the full cost of the insurance, it is inconceivable to me that Basinger, who was very involved in the insurance program, and surely knew just what the Company offer to the Union had been (to pay 50 percent of the cost), would have attempted to mislead a friend—to induce him to return by a promise that obviously could not be kept, and was not in fact the case with any returnee. Perhaps there was some reference to the fact that the Company had until a short time before borne the full cost of the *increase* in premiums. Be that as it may, I find that Basinger did not state that the Company would bear the full cost of the insurance. Accordingly, I find no violation as to this allegation.

(i) "On . . . August 24, 1972, Respondent caused to be sent to all striking employees a letter over the signature of Marvin E. Walsh disparaging John Lantz by accusing him of not taking Respondent's bargaining proposals to Union members for their consideration, by accusing Lantz of undermining negotiations, and urging members to bypass Lantz and deal directly with Respondent."

At an August 22, 1972 meeting, the Company presented a revised contract proposal to the Union, with Walsh urging Lantz to take the proposal to the membership for a vote. The Union determined not to submit the proposal to the membership, so advised Federal Mediator Fidandis, who in turn told Walsh, on August 23. The next

day Walsh sent a letter to all operators. Its full text is as follows:

> You are in receipt of our proposal for a new contract, which I handed to your Chairman and Negotiating Committee in the presence of Mediator Nicholas Fidandis, in Washington, D. C. on Tuesday, August 22, 1972.
>
> This proposal was at the request of your Chairman on Saturday, August 19, 1972.
>
> This offer concludes nearly five months of efforts on our part to bring this strike to an end.
>
> With Mr. Lantz's refusal to take our proposal to you for your acceptance, we are all back to our starting point of February 22, 1972. We have spent the intervening time and thirty-eight meetings trying to reach common grounds on which a settlement could be reached but to no avail, principally because your Chairman has constantly made more and more demands that we cannot possibly accede to, and, moreover, the fact that he won't approve for the record those issues which we have agreed upon.
>
> We feel that this type of negotiating has gone on for too long and that time for action on your part is past due. Besides denying yourselves and your families, you have caused many innocent employees to suffer by reason of being [furloughed] for lack of work.
>
> In the new proposal you will find many concessions that were purportedly stumbling blocks in our first proposal. We hope that they meet your needs and for those issues that fail to satisfy you, we must say our position is taken only after careful consideration of our economic needs to operate a successful and competitive business.

> You are all aware of our loss incurred from January through March due to weather conditions and slow business. You know the impact made by AMTRAK on our Washington-New York runs and you can well imagine the damage done to our business by GREYHOUND handling our passengers for the past five months.
>
> If you are going to keep your job and the Company is to stay in business, we had better get back to work and find a way to settle our differences while our wheels are rolling, not by destroying our income and thereafter expect to increase your benefits.
>
> I feel that it is time for each of you to reflect that *to date* no one has *won anything*, instead we are all much poorer for our experience.
>
> I sincerely hope that each of you will act in the interest of your own personal welfare and aid in getting an early settlement of this strike.
>
> You are offered the best contract in the business. Take it apart and learn for yourself what an opportunity you really have.

The General Counsel and the Union contend that this letter constituted an invitation to the members to accept the contract even though Lantz had refused to submit it to them for a vote, that the celerity with which the letter was sent, with another bargaining session scheduled for 4 days later, "shows Respondent's lack of desire to reach an agreement with the Negotiators, and that Respondent was interested in dealing directly with employees." Respondent contends that this allegation of the complaint (which was by way of amendment at the hearing), is barred by Section 10(b) of the Act, and Respondent also argues that the

letter was not an attempt to undermine the Union, but was "a protected and wholly valid communication."

As to Respondent's 10(b) contention, I adhere to my ruling at the hearing. *Spruce Up Corp.*, 194 NLRB 841, *The Singer Company, Wood Products Division*, 158 NLRB 677, 680-682; *Efco Corporation*, 150 NLRB 1505, 1511, fn. 9; *N. L. R. B. v. Reliance Steel Products Co.*, 322 F. 2d 49, 53-54 (C. A. 5).

As to the substance of the letter, the General Counsel cited the *General Electric* case, (*General Electric Company*, 150 NLRB 192, 271, enf'd 418 F.2d 736 (C. A. 2). Trial Examiner Arthur Leff in that case stated: "Respondent's haste to publicize its offer reflected the want of an earnest effort on its part to seek through the process of collective bargaining a possible basis for mutual agreement, and constituted clear evidence of bad faith." Aside from the fact that the Trial Examiner, the Board and the Court of Appeals all specifically stated that the communications of the company alone were not *per se* violative of the Act, even the statement quoted begins with "In the particular circumstances of this case." And the "particular circumstances" of the Company's communication to employees in *General Electric* were that the day after it presented the Union, for the first time, with a formal offer, and before any negotiations on that offer were conducted, it proceeded to publicize it to the employees in terms that, in conjunction with previous statements and a host of other matters, formed the basis for the Trial Examiner's conclusion. Here, the Company offer of August 22 came after 5 months and close to 40 bargaining sessions. In these "particular circumstances," the communication to the employees cannot be characterized as an intent to deal directly with the employees. It represents no more than a legitimate tactic of urging the employees to communicate with

their representative, to persuade them to tell their negotiators they wanted them to accept the Company's newest offer. That such a communication is lawful is manifest from the Board's holding in *Procter & Gamble Mfg. Co.*, 160 NLRB 334, 340, where the Board said: "as a matter of settled law, Section 8(a)(5) does not, on a *per se* basis, preclude an employer from communicating, in noncoercive terms, with employees during collective-bargaining negotiations. The fact that an employer chooses to inform employees of the status of negotiations, or of proposals previously made to the Union, or of its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith." Accordingly, I find no violation in the August 24, 1972 letter to the employees.

D. *The 8(a)(1) Allegations*

(a) The complaint's allegation that all the conduct set forth in the paragraph concerning 8(a)(5) also specifically violated Section 8(a)(1) has already been considered above with respect to each allegation.

(b) "On or about February 26, 1973, Respondent caused to be sent to the homes of all striking employees a document signed by William Basinger informing the strikers that after March 1, 1973, they would no longer be insured under Respondent's group insurance program and indicating as the reason therefor that the individual striking employees were terminated."

From the time the strike began, April 2, 1972, until February 1973, the Company had maintained in effect the insurance that had existed for its employees, with strikers who so desired continuing to be covered by paying their

premiums.[17] In February, the Company decided to discontinue the insurance coverage for the strikers, effective March 1, 1973.[18]

On February 26, a letter was sent to all strikers (133) who had maintained their insurance coverage, to inform them of the cancellation, and that they could convert to individual policies. Subsequently some 52 conversion forms were sent, between February 27 and March 28, 1973, to strikers who indicated they did wish to convert. One of the pages of each of the two forms (one for life and the other for medical insurance) was a questionnaire, with one form containing the language "Date of Termination," and the other "a terminating employee." The General Counsel asserts that this language violated Section 8(a)(1) because it meant to the employees receiving it that they were discharged. The General Counsel asserts that even though the insurance carrier, Connecticut General Life Insurance Co., required the Company to use the forms it provided, and would not permit Basinger to alter the forms in this respect, the failure of the Company to

17. The Company paid an increase in the premium set by the carrier in June 1972.

18. Respondent objects to the General Counsel's contention in his brief that the timing of the termination was part of the campaign to induce strikers to return to work as not being part of any allegation of the complaint. The General Counsel responds by disavowing any intent to allege the termination as a specific violation, but asserts that it is "part of the background of events," and therefore properly before me. I agree with Respondent that there was no intent to litigate, even as "background," its motivation in terminating the insurance—for the evidence and testimony in this connection was placed in the record solely, in my view, to explain the sequence of events that led to Walsh's letter and its accompanying forms, one word of which is alleged to have violated Section 8(a)(1). In any event, based on the evidence presented, I am satisfied that the Company's cancellation was not invidious, but was necessitated by the contract requiring 75 percent participation in the plan.

correct the impression that this language meant the strikers were discharged, known to the Company by virtue of Mrs. Stevens call (see (d) above), and confirmed by Basinger's having originally attempted to delete the word "terminating and substituting "striking" therefore, was coercive and violated Section 8(a)(1) of the Act.

I do not agree. That the Company's intent was lawful is clear from the above recitation of facts, and virtually conceded by the General Counsel. That the Company never in fact terminated any striker is also clear. With respect to the "confusion," the Stevens example, and there is no other, scarcely give rise to a conclusion that everyone would be "confused," and in the Stevens' case, Walsh assured Mrs. Stevens that her husband was not discharged the moment she called. The fact that Basinger attempted to change the forms and carrier refused to permit that correction does not militate against Respondent, it does not make a sow's ear out of that silk purse.[19] In these circumstances, and for these reasons, I find no violation in the use of the words "terminating" and "terminated" in the standard forms sent out, and shall dismiss this allegation of the complaint.

(c) "In or about October 1972, . . . William Basinger urged striking employees while they were picketing the Respondent's Washington, D. C. terminal to give up the strike because Respondent would no longer deal with the Union."

There is a flat conflict in the testimony concerning this allegation. Employee Louis Phelps testified that, in October 1972, Basinger spoke to him and and striker Melvin Winslow while they were picketing at the Washington, D. C. terminal, asking them why they did not come back to work, telling them that Walsh was "fair," and had made "fair offers," that John Lantz "was doing the best he could for us," and that Walsh "was through dealing with us." Basinger testified that he had no conversation with Phelps in October 1972, although he talked with him on other occasions, and specifically denied telling Phelps that the men should come back to work because Walsh "is through dealing" with the Union.

I was impressed with Basinger as a witness, in my opinion he testified with complete candor and appeared to have an accurate memory of events and conversations he had with strikers. Also, as Respondent points out, he had not been at the negotiating sessions, and did not know how negotiations were progressing, so that it does not appear likely that he would have made the remark attributed to him. Accordingly, I find that the General Counsel has not shown any violation as to this incident.

19. The "silk purse" being the obviously careful attempt by the Company *not* to use words that might suggest to the strikers that they were discharged.

(d) "On or about February 3, 1973, Marvin E. Walsh told employees at Natural Bridge, Virginia that Respondent could operate with 150 strike replacements and that any employee who should return to work after April 1, 1973, would lose his seniority."

The General Counsel contends that Walsh's comments to returning strikers and new drivers at a retraining seminar at Natural Bridge, Virginia, in early February 1973, violated Section 8(a)(1). The testimony concerning these comments is that of employee William Powell, and, in pertinent part, has Walsh explaining that the Company could operate with 150 drivers, that anyone could return to work under existing conditions, and that after the neces-

sary men to run the Company had been hired, "this wasn't an indefinitely lasting thing." [20]

I cannot perceive any violation based on Powell's testimony. The General Counsel asserts that it shows that "subsequent [to the "cutoff" of 150] returnees would be somehow treated differently." But, even aside from the fact that Powell could not recall specific words, and only "was led to believe," the rights of would-be returning strikers are not the same after a company has hired back and restaffed with all the employees it needs; the company is only required to take them back as vacancies arise. *The Laidlaw Corporation,* 171 NLRB 1366, enforced 414 F. 2d 99 (C. A. 7), cert. denied 397 U. S. 920. Nothing in Powell's testimony suggested that after a striker was taken back following the "cutoff," he would lose seniority. Accordingly, I find no violation as to this allegation of the complaint.

(e) "On or about February 15, 1973, L. Hilton Warwick told striking employees at the Baltimore, Maryland, terminal that after Respondent hired 150 strike replacements employees who had remained on strike would lose their seniority."

To prove this allegation of the complaint, the General Counsel relies on an affidavit of strikers [sic] William Paul Williams, which states that in the course of a conversation with Company Vice-President Warwick, the latter, in explaining to Williams the rights of strikers who wished to return to work,[21] went on to say that after 45 days (the

20. Powell prefaced this latter phrase by saying "But I can't remember specifically what he said they would do. But there again, I was led to believe that. . . ."

21. This explanation, as stated in the affidavit as well as in Williams' testimony on the stand, was a clear and accurate summary of the strikers' rights and the Company's obligations under *Laidlaw, supra.*

time it would probably take the Company to accumulate the number of operators needed to provide service) any returning striker "would be hired as a new employee." Williams testified, however, that Warwick did not threaten him with any loss of seniority. He also testified that he told employee Fowler of the conversation, and that there was no mention of the critical statement, and Fowler confirmed this.

The General Counsel claims that other circumstances, such as Fowler asking his wife to call the Labor Board, and her having done so, to ask some questions about his legal rights, bear out the truth of the affidavit. In the light of the fact that no returning striker was ever hired as a "new employee," or denied seniority in any way, considering also that Williams' affidavit stated that employee Melvin Mathias was also told "the same things" by Warwick, yet Mathias, who testified as a General Counsel witness, was never even asked about this, and in the face of Warwick's denial that he made any such remark, I do not accept the statement in the affidavit, but accept rather Williams' and Fowler's, as well as Warwick's, testimony, and find no violation in this respect.

(f) As to the allegation in this section of the complaint, there is no evidence in the complaint at all, as the General Counsel agrees, and it is accordingly dismissed.

(g) "On or about April 5, 1973, James McGraw and L. Hilton Warwick, at Respondent's Washington D. C. offices and on or about March 25, 1973, James McGraw in telephone conversations, told striking employees that in order for them to return to work they would have to resign from the Union."

As to the March 23 allegation, the General Counsel relied upon the testimony of William Mishou. He stated

that he called the Company in March to find out the procedure for returning to work, and spoke with Company official McGraw. Mishou's testimony as to what McGraw said was given as follows: "I am fuzzy on that. I thought that he said to me that I would have to sign a letter to Glenn Hudson, President of UTU Local 1699, that I was resigning the Union. But I am hazy on that because—I will be honest with you: I have been drinking quite heavy." Mishou also testified to having been offered, and receiving, 2 weeks picket duty pay for picketing he did not perform the night before he went to the Labor Board office to give his statement. In view of the admittedly "fuzzy" recollection of Mishou, the timing of the payment to him by the Union for picket duty he had not performed,[22] and the fact that he testified he ultimately returned to work in July without resigning from the Union, I can place no reliance on his testimony, and find no violation of the Act in this respect.

The April 5 allegation involved employee Dennis Schwark, and will be considered together with the next allegation of the complaint, to which it is closely related, and which states:

> (h) "On or about April 5, 1973, an agent of Respondent . . . rendered unlawful aid and assistance to Respondent's employees in an effort to cause them to resign from the Union."

Schwark testified that he wished to return to work, and met with McGraw and Warwick in McGraw's office in Washington, D. C. on April 5, 1973. He was "inquisitive to know if I could belong to the Union and still drive."

22. I draw no conclusion that the payment was unlawful in any way, particularly because of evidence which at least suggests that availability for picket duty may have been enough to justify the payment. It is the timing of the payment I am taking into account.

Asked, "Did you ask that question of Mr. McGraw and Mr. Warwick?" Schwark replied "Well, it was brought up, and I don't know who brought it up." Schwark then added that he "had intentions of resigning anyway," that he "couldn't afford Union payments. I was planning to resign anyway." Schwark "felt it convenient for them to type up . . . the resignation letter from the Union." A secretary did type the letter, which he "reread carefully," and signed. Schwark further testified that he was not told he had to resign from the Union in order to come back to work, and he was not offered any inducement to come back to work.

Schwark's testimony does not establish that McGraw or Warwick induced him to resign from the Union, or in any manner suggested or intimated that he would have to resign in order to return to work. There is no question but that Respondent assisted Schwark to resign by having a Company secretary prepare the letter. But, as Schwark testified, he "felt it convenient for them to type up the letter." And he had already told McGraw and Warwick of his determination to resign. In these circumstances, the minimal assistance given by the Company obviously had nothing to do with Schwark's decision, and I do not find that as a matter of law such assistance violates the Act. The only case cited by the General Counsel in support of finding this a violation is *San Jeronimo Hilton Hotel,* 187 NLRB 947. In that case, the company personnel manager did state to employees that he would prepare a letter rejecting the union for them, but at the same time he offered all employees $200 and a pay raise to abandon the strike and return to work. The distinction between this case and that is too obvious to require discussion.

The General Counsel also relied on some six letters of resignation, of employees who were not called as witnesses, to support this allegation of the complaint, asserting that they are "strikingly similar in style and format" to each

other and to Schwark's letter of resignation, which was admittedly prepared by the Company. Assuming, without deciding, that these six letters were prepared by the Company, as there is no evidence to show that the Company did any more than just that, they stand on no better footing than does the Schwark letter itself. Accordingly, I find no violation entailed with respect to Schwark or with the other six letters of resignation.

(i) "On or about October 12, 1972, Marvin E. Walsh called a striking employee on the telephone and in the course of that telephone conversation, by discussing matters mentioned at a Union meeting held October 11, 1972, created the impression that the meeting and the employees' participation therein were under surveillance."

In early October 1972, James Gore, a former President of the Union and Chairman of its Grievance Committee, had discussed, at a Union meeting, two particular proposals the Company had made at a negotiating meeting a short time earlier, expressing his concern and opposition quite strenuously at the Union meeting. Shortly thereafter Walsh called Gore to explain to him certain matters about these two proposals. The General Counsel contends that by explaining to Gore the very two provisions about which Gore had expressed concern at the Union meeting, Walsh necessarily created the impression that the Company had the Union meetings under surveillance. That Walsh in fact did not have the meeting under surveillance is not disputed, for it is uncontradicted that striker Williams called Walsh and told him that Gore was concerned about these provisions,[23] and that it was because of Williams' call

23. It is not completely clear from Walsh's testimony whether, in referring to Gore's concern, Williams specified that the concern was expressed at a meeting.

that Walsh called Gore. In these circumstances, it is plain that there was no intent of Walsh's part to indicate, by indirection, that he had the Union meeting under surveillance. Although it is true that Gore, because Walsh did not tell him how he had learned of Gore's concern, could have drawn the inference that Walsh has spies at the Union meeting, it is difficult to believe that Gore, who, as Respondent notes, was a former president of the Union, would have thought along those lines, or would in any way have felt threatened by Walsh's knowledge. Accordingly, I find no violation as to this allegation of the complaint. *Woodruff Electric Cooperative Corp.*, 174 NLRB 575, 580-581.

E. *The General Allegation of Bad Faith*

As to those specific aspects of the complaint where I have found that the testimony does not support the General Counsel's factual allegations, no more need be said. With regard to the one specific violation found, the statement by Paul Miller, for the same reasons set forth above for not requiring any remedy with respect to it, it has no bearing on Respondent's good faith—that is, it plainly did not represent company policy. I will now, however, consider the General Counsel's and the Union's contention that the other allegations, particularly the Walsh letters of August 24 and December 14, 1972, when viewed in the light of other letters and communications by Respondent prior to the 10(b) period,[24] Respondent's resume of the April 28, 1972 negotiations, and letters and communications during the 10(b) period not specifically alleged as violative of the Act,[25] demonstrate a campaign "designed to

24. E.g., the April 5, 1972 and May 4, 1972 letters, as well as Walsh's conversation with Gore in June 1972.

25. E.g., the Company's letters of November 10 and November 16, 1972.

discredit and disparage the Union's Chief Negotiator Lantz and the Union itself," . . . "a campaign . . . inconsistent with Respondent's obligation to bargain in good faith with the representative of its employees, irrespective of Respondent's conduct at the negotiation table, and . . . actually destructive of good faith negotiations. . . ."

The principal item of "background" relied upon by the General Counsel and the Union is contained in the Company's resume, prepared May 1, 1972, of the negotiating session that had been held April 28, 1972. After summarizing the occurrences at the April 28 bargaining session, the resume has a "Conclusion," reading as follows:

> At this time I [26] see no possibility of settling a contract with Lantz and it appears to me that we have but three possibilities.
>
> (1) Inform the membership and the employees of the absolute irresponsibility of their representation in an effort to get them to boot Lantz out.
>
> (2) The U. T. U. International taking over these negotiations and putting in someone who can intelligently negotiate and reach an agreement.
>
> (3) Failing to achieve Nos. 1 and 2, it appears that this will be a long work stoppage with the definite possibilities of having to put this Company back to work without a settlement with the U. T. U.

The resume was purely an internal matter; it was not sent to the Union, to the employees or to the Federal Mediator. The General Counsel contends, however, that the three steps outlined therein constituted Respondent's

26. The "I" is apparently either Company official H. L. Glisas or McGraw.

"strategy concerning its future conduct," and that the specific allegations of the complaint were an implementation of that strategy, with the first two steps begun almost immediately. The Union, putting it more strongly, states that the May 1 resume, in its conclusions, "categorically defined" Respondent's "refusal to bargain." Because this resume forms the predicate, in large part, for the theories of the General Counsel and the Union concerning the general "refusal to bargain" allegation, it bears particular analysis. The full context of the resume is important, not for establishing as fact what is said therein, but as demonstrating the Company's view of what had occurred, why it had occurred, and why it saw "no possibility of settling a contract with Lantz." The full resume (headings, time, etc. eliminated) is as follows:

> Due to the fact that we had finished discussing the list of some 76 items the day before, this meeting only involved a matter of three or four items on which we had agreed the day before to furnish revised wordings. These items were insignificant, but as usual Lantz had balked at agreeing to anything.
>
> The first item discussed was a small matter where we had suggested going back to the wording of the expired contract. The Secretary in copying from the old contract omitted a comma and Lantz spent thirty minutes ranting about this missed comma. His appearance was not normal. He gazed out of the window constantly while the Mediator attempted to get him to agree to one or two more items, sentence by sentence. Kelly appeared to be rather embarrassed but took no hand to do anything.
>
> Finally at about 3:30, after a separate session with the Mediator, we were completely at a standstill with

nothing more to discuss. I told the Mediator that I would like to make a statement, and I summarized the fact that these negotiations had gone on many, many days with many concessions by the Company, and that the Union had not in any manner shown indications of changing from their original position. That concessions by the Company before and after the strike amounted to improvements to the employees of approximately one-half million dollars over a three year period. That as of today, the lost wages suffered by the employees amounted to in excess of one-half million dollars and that no one can win under these circumstances. That we could see no possibility for meaningful negotiations so long as the Union Chairman continued as evidenced by his 30 minute tirade today about the placement of a comma, to refuse to realistically negotiate.

I told Kelly to his face, that we were amazed that he would lend the dignity of his office and position to this type of a situation. While I was talking, Lantz put on a very childish act, brushing mock tears off his lapel and asking Kelly for a handkerchief. When I finished, Lantz in a very smart alec manner asked just how I had arrived at the one-half million dollars in improvements which the Company had offered over a three year period.

I answered him that this had been done with reasonable intelligence, a pencil and a piece of paper, which he could have done himself had he been in possession of these three items.

Kelly then made some remarks concerning the past troubles which the U. T. U. had with Safeway, again repeating that had the U. T. U. not sanctioned the

strike on April 1, that the men were so incensed and stirred up that the wildcat strike would have occurred anyway with all the violence and destruction (these are his words) that occur in a strike of that kind. We got the impression that his heart was not exactly in what he was saying, but he felt he had to make some sort of a reply.

The meeting broke up about 3:45 with the Mediator stating that he saw no possibility of further progress at this time and would recess the meeting and the next meeting would be called by him with proper notification to both parties.

Lantz was so upset that he spoke to no one, the Mediator or the Company people as he left. Kelly, however, did shake hands with Walsh.

CONCLUSION:

At this time I see no possibility of settling a contract with Lantz and it appears to me that we have but three possibilities.

(1) Inform the membership and the employees of the absolute irresponsibility of their representation in an effort to get them to boot Lantz out.

(2) The U. T. U. International taking over these negotiations and putting in someone who can intelligently negotiate and reach an agreement.

(3) Failing to achieve Nos. 1 and 2, it appears that this will be a long work stoppage with the definite possibilities of having to put this Company back to work without a settlement with the U. T. U.

I must conclude, based on the Company's expressed view of the negotiations in the resume of May 1, 1972, that seeing "no possibility of settling a contract with Lantz" was not intended, even as an internally held Company view, to express that the Company *would* not sign a contract with Lantz as the Union's chief negotiator. Rather, the Company did not believe it *could* settle a contract with Lantz, based on the many negotiating sessions held up to that time, and the Company's view that it had made many concessions, and the Union had not, that it was Lantz who "balked at agreeing to anything," and "spent thirty minutes ranting about [a] missed comma," in addition to the complaints about Lantz already expressed in Walsh's communique of April 5. That, holding such a view, the Company would want to pursue all efforts "to boot Lantz out" does not translate into a refusal to settle a contract with Lantz there, but a hope that his departure would result in an agreement.

The second "conclusion" in this resume, expressed the possibility of the U. T. U. International "taking over," then states "and putting in someone who can intelligently negotiate and reach an agreement." Although this resume was prepared by the Company, and for its own use, not for publication to employees or anyone else, it was introduced by the General Counsel, and therefore cannot be viewed as "self-serving" with respect to representing the Company's firmly held and honest opinion at the time. To me, the second conclusion demonstrates that the Company wanted to reach agreement.

The General Counsel and the Union would have it that the Company, having seen "no possibility of settling a contract with Lantz," was somehow wedded to the proposition that it would not reach an agreement with Lantz. Such a construction might be tenable had the

Company made the resume public (perhaps with the omission of the second conclusion), on the theory that it "boxed itself in." Cf. *General Electric, supra.* But that was not the case here. As to the third conclusion, since it is perfectly lawful for a company to continue operating during a strike, it can scarely be unlawful for a company to decide to go back into operation after having shut down when a strike began. Again, the third conclusion talks about the "possibilities" of resuming operations "without a settlement," demonstrating that at least as reflected in this resume on May 1, 1972, the Company wanted to reach a settlement, but was having difficulty in doing so.

The other letters and communications to various employees adverted to by the General Counsel were, indeed, intended to implement steps one and two of what the General Counsel called the Company's "Master Plan." On May 4, 1972, the Company did urge the International to "assume its responsibility in this matter." In June 1972, Walsh did call former Union President Gore, indicate to Gore that he could not get along with Lantz, state a number of specific problems he had with Lantz, and ask Gore to talk to other strikers about the Company's problems with Lantz. The Company continued to complain about Lantz thereafter, with Walsh telling employee Day that the older men should do something about it, and again in letters to strikers on November 10 and 16.

All this, urge the General Counsel and the Union, demonstrate that the Company "had no desire to deal with Lantz or the Union Committee," and as stated earlier, that the Company was not bargaining in good faith, even though Respondent's conduct at the bargaining table was not alleged as evidence of its bad faith.

For reasons stated in "A" above, I regard the General Counsel as having conceded that the at-the-table bargain-

ing was in good faith. For that reason alone, the General Counsel's reliance on cases such as *General Electric, supra,* and *Wire Products, supra,* is misplaced. For in those cases there was no such concession, and even though the conduct *away* from the table was largely instrumental for the Board's conclusion that the bargaining at the table was not in good faith, was not commensurate with the statutory obligation to bargain, the Board did examine the conduct at the bargaining table in the light of the conduct away from the table.

The situation here is completely different. Indeed, it would be a violation of due process to find bargaining at the table in bad faith here, not only because of the pleadings themselves, and the posture in which the case was presented, but also because we do not know what happened at the table, the company itself not having been permitted to adduce evidence of what happened, often because I sustained General Counsel objections to questions concerning the negotiations.[27] Thus, for all I know, or am supposed to know, the Company might have been able to demonstrate 100 percent good faith bargaining at the table. It was not called on to do so, because it had no need to defend itself with respect to "at the table" bargaining.

In *General Electric,* the Board stated (at p. 195): "We do not rely solely on Respondent's campaign among its employees for our finding that it did not deal in good faith with the Union. Respondent's policy of disparaging the Union by means of the communications campaign . . . was implemented and further [sic] by its conduct at the bargaining table." Furthermore, although *General Electric's* communications program, constituting a "virulent attack" on the union's top leadership, was a principal factor in finding a violation, as Trial Examiner Leff pointed out, it was a tactic "decided upon long in advance of negotiations" (p. 276), and the Company's "purpose was not simply to keep employees informed of its views on bargaining and related issues" (p. 277). Leff also found that these tactics "not only tended to but *did* result in 'deficiencies in its performance at the bargaining table' that 'obstructed and inhibited' good faith bargaining." In short, the differences between this case and *General Electric* are far greater than the similarities.

In *Wire Products, supra,* although the Board found a violation of Section 8(a)(5) "notwithstand [sic] the General Counsel's admission and our agreement that Respondent did not otherwise violate the Act during the bargaining sessions that took place," the unfair labor practices found included violations of Section 8(a)(1) and (3) of the Act, the Board found that the away-from-the-table conduct was designed to undermine and destroy the Union's majority, and what occurred at the bargaining sessions had not been excluded from consideration.

I shall not analyze each case cited by the General Counsel. Many of the principles set forth by him are sound enough; indeed, many are themselves quoted from Board and Court decisions. But these principles cannot be read out of context. Of all the cases cited to me by the parties, I believe, as to this aspect of the case, *Baldwin County Electric Membership Corp.,* 145 NLRB 1316, is most apposite. There, a Board panel (Chairman McCulloch and Members Fanning and Brown) reversed a Trial Examiner's 8(a)(5) finding, which had been based on various statements found to constitute 8(a)(1) violations, including threats, promises of benefits, and the like, as well

27. Bits and pieces of the bargaining table discussion are in the record, introduced for the purpose of shedding light on *away* from the table matters alleged as violations in the complaint.

as statements to the effect that the company did not intend to enter into an agreement with the union. The Board's conclusion is particularly illuminating. It stated (at p. 1318): "Although under some circumstances an employer's statements away from the conference room may be utilized to explain otherwise ambiguous conduct at the bargaining table, this is not such a case. Here the Respondent's bargaining conduct does not appear to have been ambiguous in any way. As the record in our view establishes clearly the Respondent's good-faith bargaining at the bargaining table, we find no basis for concluding on the strength alone of the Respondent's statements away from the bargaining table that its otherwise lawful bargaining conduct was converted into a violation of Section 8(a)(5)."

That no finding of bad faith bargaining can be made in the instant case follows *a fortiori* from *Baldwin*. Accordingly, and aside from the fact that I do not believe this issue is really in the case, I do not find that Respondent's away from the table conduct could conceivably give rise to a violation of its duty to bargaining here, and reject this contention of the General Counsel and the Union.

F. *The Nature of the Strike*

Having found no unfair labor practices in this case, I necessarily could not find that the April 2, 1972 strike was ever converted to an unfair labor practice strike. Even if some of the particular allegations of the complaint had been unfair labor practices, however, with a number of key issues remaining unresolved up to and including the last bargaining session on January 28, 1974, with the last unfair labor practice alleged to have occurred on April 1973, I could not possibly have found, absent evidence to demonstrate some connection between the assumed unfair labor

practices and the continuation of the strike, that the strike was an unfair labor practice strike. The Board, after all, has stated many times that an employer's unfair labor practices "do not automatically convert a strike into an unfair labor practice strike. Such conversion will be found only where there is proof of a causal relationship between the unfair labor practices and the prolongation of the strike." *Anchor Rome Mill, Inc.*, 86 NLRB 1120, 1122. See also *Romo Paper Products Corp.*, 208 NLRB No. 96.

For all the above reasons, I find that the General Counsel has not shown that Respondent violated the Act.

CONCLUSION OF LAW

The evidence does not establish that Respondent engaged in the unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusion [sic] of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: [28]

ORDER

The complaint is dismissed in its entirety.

Dated at Washington, D. C.

/s/ MELVIN J. WELLES
Melvin J. Welles
Administrative Law Judge

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28. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1561

UNITED TRANSPORTATION UNION, LOCAL NO. 1699,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

SAFEWAY TRAILS, INC., INTERVENOR

Petition for Review of an Order of the
National Labor Relations Board

Argued September 20, 1976

Decided December 9, 1976
(Judgment entered this date)

Edward D. Friedman for petitioner.

Bert Bisgyer, Attorney, National Labor Relations Board, with whom *John S. Irving,* General Counsel, and *Elliott Moore,* Deputy Associate General Counsel, National Labor Relations Board, were on the brief, for respondent. *William C. Humphrey,* Director, Region 5, National Labor Relations Board, also entered an appearance for respondent.

John H. Leddy, with whom *Warren W. Woods* was on the brief, for intervenor.

Before BAZELON, *Chief Judge,* and WRIGHT and ROBINSON, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: The primary issue presented by this petition for review is accurately stated by the National Labor Relations Board's General Counsel in his amended memorandum to the Board [1] in support of his exceptions to the findings and conclusions of the Administrative Law Judge (ALJ). It is whether "[t]he Administrative Law Judge committed fundamental error in finding that the General Counsel conceded that [the employer's] conduct at the bargaining table was in good faith and, on the strength of that finding, [in] refusing to find that Section 8(a)(5) was violated in the manner alleged." [2] If the ALJ was in error in this finding his ultimate conclusion that no Section 8(a)(5) violation had been shown must also be set aside since the ALJ, acting on an assumption of good faith at the bargaining table, appears to have placed on the General Counsel a greater burden of proof than would otherwise have been the case.[3]

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1. The Board affirmed the ALJ's findings and conclusions.

2. The ALJ prefaced his decision with this statement:

> I do not in any event agree with [the position of the General Counsel and the union] that [the employer's] "at-the-table" bargaining is in issue here. Based on a pre-hearing conference held in this case, various discussions and positions at the hearing, and the way the entire proceeding was tried, I am satisfied that the at-the-table bargaining not only was *not* [emphasis in original] under attack, *it was conceded, at least by the General Counsel, that the bargaining was conducted in good faith.* That was my understanding at the hearing, and I see no reason to change my view. • • •

JA 8 (emphasis added; footnote omitted).

3. The ALJ stated at the outset of his opinion:

> • • • I shall consider herein whether the away-from-the-table conduct was *so pernicious* as to warrant a conclusion that [the employer] could not have been bargaining in good faith at the

The General Counsel's position throughout the proceeding, accurately summarized by the ALJ, was that intervenor Safeway Trails had sought to undermine the bargaining representatives of the union, thereby "demonstrating that [Safeway Trails] had no intention of reaching agreement with the Union." JA 7. Section 8 of the General Counsel's complaint set out a series of acts which, if proved, constituted a "campaign to discredit Union Chief Negotiator John Lantz and the Union's negotiating committee ° ° °." Supp. JA 16. In short, it was "the General Counsel's contention that this campaign to deal with the Union through the employees rather than deal with the employees through the Union was the very essence of bad faith bargaining and constitut[ed] a violation of [Section] 8(a)(5) of the Act." Tr. 18. In his opening remarks the General Counsel characterized this theory as alleging an "overall bad faith charge." Tr. 14. Despite these statements the ALJ concluded that the General Counsel had conceded "that the bargaining was conducted in good faith." JA 8. Because the ALJ did not refer to any point in the record where a concession directly opposite to the opening remarks of counsel could be found, and because we have found no such part of the record, we think the ALJ's conclusion is, at the very least, suspect.

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3. (Cont'd.)

table no matter what was shown to have taken place during the bargaining sessions.

JA 8 (emphasis added). The proposed "so pernicious" test appears to require more than a showing of disparagement. Also, at the end of his opinion the ALJ took the position that some showing of ambiguous bargaining table behavior was required to make out a § 8(a)(5) violation on away-from-the-table evidence. JA 44. The ALJ then concluded that, *"a fortiori,"* good faith at the bargaining table prevented a finding of a § 8(a)(5) violation. *Id.* We think this conclusion is not free from doubt and can be sustained only if more adequately explained.

We further think it inconceivable that the General Counsel would have conceded good faith at the bargaining table in the off-the-record pretrial conference. As we understand the legal theory of the General Counsel, the scope of the concession that was made was simply that neither side sought to introduce evidence about the "externals of [the] collective bargaining," *General Electric Co.*, 150 NLRB 192, 194 (1964), *enforced*, 418 F. 2d 736 (2d Cir. 1969), *cert. denied*, 397 U. S. 965 (1970), because evidence of what happened at the table was simply not sufficiently probative of Safeway Trails' lack of desire to reach an agreement to warrant the burden of putting the information into the record.[4] In omitting evidence about the actual course of negotiations, the General Counsel appears to have been relying on *General Electric Co., supra*, in which the Board stated:

> Good-faith bargaining thus involves both a procedure for meeting and negotiating, which may be called the externals of collective bargaining and negotiating, *and a bona fide intention, the presence or absence of which must be discerned from the record.*

150 NLRB at 194 (emphasis added). While the *General Electric Co.* Board relied on behavior at the bargaining table to infer lack of a bona fide intent, *see id.* at 195-196, it also specifically found that the "negotiations themselves ° ° ° maintain[ed] the form of 'collective bargaining' ° ° °," *id.* at 196. Without further explanation, we do not see any reason why the propriety of the "form of 'collective bargaining'" could not be conceded and yet overall bad faith still be found. On the other hand, if

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4. This point was made by the General Counsel in his brief to the Board. It is also supported by the transcript. *See* Tr. 557-558, 589.

the General Counsel both introduced no evidence concerning the "externals" of the at-the-table bargaining and conceded "good faith," there would appear to be nothing left of his case under *General Electric Co.*[5]

It is true, of course, that the ALJ should be sustained if he decided correctly that a Section 8(a)(5) claim could not be made out in the absence of at least some evidence of bad faith at the bargaining table. JA 42-44. However, we do not think such a result is required by *General Electric Co.*, which we read to stand for the following propositions: [6] If intervenor's away-from-the-bargaining-table activities with respect to its employees were directed toward undermining the bargaining representative of those employees, bad faith and a Section 8(a)(5) violation have been established even though overt evidence of that bad faith does not appear at the bargaining table itself. If the authority of the employees' bargaining representatives at the bargaining table has been subverted, as far as the interests of the employees are concerned it matters little where and when the subversion took place. Moreover, we do not find any indication that any party to the proceedings before the ALJ thought that at-the-table evidence

5. When the ALJ stated that the bargaining had been in good faith, he may have been speaking colloquially about the "externals," but we cannot be sure on this record that the ALJ did not also think some concession had been made about the overall good faith of Safeway Trails.

6. We recognize that the Second Circuit, in upholding the Board's order in *General Electric Co.*, did not adopt precisely this view, but placed reliance on General Electric's policy of take-it-or-leave-it bargaining as well. *See* 418 F. 2d at 756, 760. The Second Circuit did not, however, take the position that proof of an at-the-table violation was always required. Instead, the court stated the proper test to be one considering all the facts and circumstances, including actions which in themselves did not violate the National Labor Relations Act. *See id.* at 756-757. In any case, the legal sufficiency of the theory stated in text is not before us now since we cannot be sure what view the Board adopted in this case.

was necessary and, indeed, the record shows that Safeway Trails as well as the General Counsel sought to keep evidence of the negotiations out of the record. Tr. 558. In these circumstances, Board confirmation of the ALJ's opinion that some at-the-table evidence of bad faith must be introduced to make out a Section 8(a)(5) violation can at best indicate that the Board has impermissibly "backed into" a change of the law. *See Greater Boston Television Corp. v. FCC*, 143 U. S. App. D. C. 383, 394, 444 F. 2d 841, 852 (1970), *cert. denied*, 403 U. S. 923 (1971).

Given the uncertainties that surround both the Board's and the ALJ's opinions here, we vacate the Board's order and remand this case to the Board for reconsideration.

So ordered.

233 NLRB No. 171

FPT
D—3266
Washington, D. C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 5—CA—5975

SAFEWAY TRAILS, INC.

and

UNITED TRANSPORTATION UNION, LOCAL NO. 1699

SUPPLEMENTAL DECISION AND ORDER

On March 10, 1975, the Board issued a Decision and Order[1] in the above-entitled proceeding, dismissing *in toto* a complaint alleging that the Respondent had refused, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, to bargain collectively with the Charging Party, United Transportation Union, Local No. 1699 (hereinafter called the Union or the Charging Party). Thereafter, the Union filed a petition for review and the Board filed a cross-application for enforcement with the United States Court of Appeals for the District of Columbia.

On December 9, 1976, the court issued its decision,[2] remanding the case to the Board for reconsideration of its dismissal of that part of the complaint which alleged that

1. 216 NLRB 951.
2. 546 F. 2d 1038.

the Respondent had sought to undermine the bargaining representative of the Union, thereby demonstrating that it had no intention of reaching an agreement with the Union. The court's rejection of the Board's dismissal rested on its finding that the Administrative Law Judge committed error by concluding that the General Counsel had conceded that the Respondent's conduct at the bargaining table was in good faith. The court concluded that an 8(a)(5) violation can be made out in the absence of any evidence of bad faith at the bargaining table. Accordingly, the court remanded the case to the Board with instructions to apply the test set out in the court's opinion to the facts of this case.

On February 22, 1977, the Board, through its Associate Executive Secretary, notified the parties that it had decided to accept the court's remand and that any of them wishing to do so might now file a statement of position concerning the issues raised thereby. Such statements have been filed by the General Counsel, the Respondent, and the Union.

The Board has duly considered the decision of the Court of Appeals for the District of Columbia in light of the statements of position filed by the parties in this proceeding and makes the following findings:

In its decision, the court stated that it viewed *General Electric Company*, 150 NLRB 192 (1964), enfd. 418 F. 2d 736 (C. A. 2, 1969), as standing for the following proposition:

> If [Respondent's] away-from-the-bargaining-table activities with respect to its employees were directed toward undermining the bargaining representative of those employees, bad faith and a Section 8(a)(5) violation have been established even though overt evidence of that bad faith does not appear at the bargaining table itself. If the authority of the employees'

> bargaining representative at the bargaining table has been subverted, as far as the interests of the employees are concerned it matters little where or when the subversion took place. [546 F. 2d at 1041.]

In our earlier Decision, it was not our intention to state that there can never be an 8(a)(5) violation unless evidence of bad faith has been shown at the bargaining table.[3] Rather, we interpreted the test applied by the Administrative Law Judge to be a recognition of the difficulty of determining whether a violation has occurred when the parties have provided us with a less than complete picture of what took place during the period of negotiations. In most cases, the Board can more accurately evaluate a party's conduct by examining the conduct at the table in light of the conduct away from the table, and vice versa. As we stated in *Baldwin County Electric Membership Corporation*, 145 NLRB 1316 (1964), an employer's ambiguous conduct may be made clear by having a total picture of what occurred both at and away from the bargaining table.

In the case before us, we interpret the court's decision to instruct us to regard the lack of evidence in this case as to what occurred at the bargaining table as a neutral factor, favoring neither sustaining nor dismissing the allegations of the complaint. Accordingly, we shall reevaluate the Respondent's conduct to determine whether —as alleged by the General Counsel and the Charging Party—it establishes an intent to undermine the bargaining representative of the employees.

3. The Administrative Law Judge stated that he was applying a test as to whether the Respondent's "away from the bargaining table conduct was so pernicious as to warrant a conclusion that Respondent could not have been bargaining in good faith at the table no matter what was shown to have taken place during the bargaining sessions."

The background facts, as more fully set out in the Decision of the Administrative Law Judge, may be briefly summarized as follows. The Union represented Respondent's motor coach operators for about 37 years, under a series of contracts, the last from April 1, 1969, to March 31, 1972. Between February 1972 and January 1974, the parties met on numerous and frequent occasions in an attempt to reach an agreement on a new contract, but never reached agreement. A strike of the operators commenced April 2, 1972. The Respondent ceased operations when the strike began, but thereafter resumed operations in January 1973. During the bargaining sessions, Marvin Walsh, the Respondent's president and its chief negotiator for the last 30 years, represented the Respondent, and John Lantz was the Union's chief negotiator.

The strike apparently ended on or about March 12, 1975. An RM petition was filed June 4, 1975, on the basis of which an election was held August 18, 1976, resulting in the loss of certification by the Union. See *Safeway Trails, Inc.*, 224 NLRB 1342 (1976).

In evaluating the conduct alleged by the General Counsel and the Charging Party to violate the Act, we must first examine conduct occurring outside the 10(b) period. This case involves a situation where "occurrences within the 6 month limitations period in and of themselves may not constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period."[4] Here, we must decide not only whether the Respondent's conduct interfered with the Section 7 rights of the employees but also whether it evidenced an intent to undermine the Union's representative, thereby constituting a refusal to bargain.

4. *N. L. R. B. v. Bryan Manufacturing Co.*, 362 U. S. 411 (1960).

The following events, occurring outside the 10(b) period, shed considerable light on the purpose and intention of the Respondent's away-from-the-table conduct.

On or about April 5, 1972, Walsh sent a letter to all employees, with copies to the Union's negotiating committee stating, in part, that two-thirds of the previous 18 negotiating meetings "were meaningless, or at least fruitless, because the Union chairman was not prepared, did not have full committee, and met either by himself or with one member most of the time," and that the "chairman insisted upon ridiculous demands . . . which made it impossible to reach an agreement."

On or about May 4, 1972, Walsh sent a letter to the Federal mediator, with copies to all employees and to the United Transportation Union's International president and vice president. In that letter, Walsh stated that Lantz was lacking in "responsibility and sincerity" and that it was "high time the UTU grand lodge . . . assumes its responsibity for the people they represent . . . ."

On or about May 11, 1972, in a letter to employees, Walsh accused Lantz of having misrepresented a number of items to the membership and having not presented various other proposals made by the Respondent to the employees.

In June 1972, Walsh telephoned James Gore, a former president of the Union, and told him that he could not get along with Lantz, that Lantz changed proposals every time they had a meeting, and that Lantz was not telling the membership all that was going on.

The above-mentioned incidents occurred outside the 10(b) period and therefore cannot form the basis for finding any violations of the Act. However, they are relevant as background information and clearly demonstrate the Respondent's predilection for suggesting to employees that

the major stumbling block preventing an agreement and labor peace was the presence of John Lantz as chief negotiator for the Union.

Finally, one additional matter relied on heavily by the General Counsel and the Charging Party as background for evaluating the Respondent's action is a company resume, prepared May 1, 1972, which evaluates the negotiating session that had been held on April 28, 1972. The resume is set out fully in the Administration Law Judge's original Decision in this case. The part of that document deemed most relevant by the General Counsel and the Charging Party is its "conclusions" which read as follows:

> At this time I [5] see no possibility of settling a contract with Lantz and it appears to me that we have but three possibilities.
>
> (1) Inform the membership and the employees of the absolute irresponsibility of their representation in an effort to get them to boot Lantz out.
>
> (2) The UTU International taking over these negotiations and putting in someone who can intelligently negotiate and reach an agreement.
>
> (3) Failing to achieve Nos. 1 and 2, appears that this will be a long work stoppage with the definite possibilities of having to put this company back to work without a settlement with the UTU.

The Company's resume was an internal matter not for publication, but the General Counsel and the Charging Party nonetheless contend that it indicates the Respondent's strategy to "boot Lantz out."

5. The Administrative Law Judge concluded that the "I" referred to either company official H. L. Glisas or McGraw.

Certainly, the resume serves to demonstrate that in May 1972 the Respondent desired to have Lantz removed as the Union's representative and was considering possibilities so that that end might be reached. It is unclear—and of secondary importance—whether, as stated by the Administrative Law Judge, the resume expressed only that the Respondent believed it could not—rather than would not— sign a contract with Lantz. The real significance of the resume is that it shows the Respondent was specifically considering taking action to secure the removal of Lantz as chief negotiator for the Union.

The following incidents are those within the 10(b) period that we must evaluate to determine whether or not —applying the test as stated by the court of appeals— they constitute an attempt by the Respondent to subvert and undermine the authority of the representative chosen by the employees to represent them.

At an August 22, 1972, meeting the Respondent presented a revised contract proposal to the Union, but thereafter the Union determined it would not submit the new proposal to the membership. On August 24, 1972, Walsh sent the following letter to employees: [6]

> You are in receipt of our proposal for a new contract, which I handed to your Chairman and Negotiating Committee in the presence of Mediator Nicholas Fidandis in Washington, D. C. on Tuesday, August 22, 1972.
>
> This proposal was at the request of your Chairman on Saturday, August 19, 1972.
>
> This offer concludes nearly five months of efforts on our part to bring this strike to an end.

6. The allegation of the complaint regarding the August 24, 1972, letter was added pursuant to an amendment made at the hearing. The Administrative Law Judge ruled, and we agree, that this letter was sent to employees within the 10(b) period.

> With Mr. Lantz's refusal to take our proposal to you for your acceptance, we are all back to our starting point of February 22, 1972. We have spent the intervening time and thirty-eight meetings trying to reach common grounds on which a settlement could be reached but to no avail, principally because your Chairman has constantly made more and more demands that we cannot possibly accede to, and, moreover, the fact that he won't approve for the record those issues which we have agreed upon.
>
> We feel that this type of negotiating has gone on for too long and that time for action on your part is past due. Besides denying yourselves and your families, you have caused many innocent employees to suffer by reason of being furloughed for lack of work.
>
> In the new proposal you will find many concessions that were purportedly stumbling blocks in our first proposal. We hope that they meet your needs and for those issues that fail to satisfy you, we must say our position is taken only after careful consideration of our economic needs to operate a successful and competitive business.
>
> You are all aware of our loss incurred from January through March due to weather conditions and slow business. You know the impact made by AMTRAK on our Washington-New York runs and you can well imagine the damage done to our business by GREYHOUND handling our passengers for the past five months.
>
> If you are going to keep your job and the Company is to stay in business, we had better get back to work and find a way to settle our differences while our

wheels are rolling, not by destroying our income and thereafter expect to increase your benefits.

I feel that it is time for each of you to reflect that *to date* no one has *won anything*, instead we are all much poorer for our experience.

I sincerely hope that each of you will act in the interest of your own personal welfare and aid in getting an early settlement of this strike.

You are offered the best contract in the business. Take it apart and learn for yourself what an opportunity you really have.

In October 1972, Walsh telephoned employee John Mathias and spoke with Mathias, whose wife was listening in on the extension. In discussing the strike and related circumstances, Walsh informed Mathias to the effect that "I can't negotiate with Lantz," or with "somebody with all the whiskers or beard on his face."[7] Walsh also stated that he was having a "rough time" bargaining with Lantz.

On or about December 14, 1972, the Respondent sent letters to some 26 senior striking employees. The letter in question read as follows:

Dear Operator:

It is almost Christmas and the strike is now well into its 9th month. If you will carefully read the company's last and final offer good until December 31st, you can see it is an extremely good offer taking in consideration the mileage rate, cost of living, holidays and funded pension plan.

7. Our recitation of Walsh's statements is based on the factual findings and credibility resolutions of the Administrative Law Judge.

It is very puzzling to me why the operators, who have been with this company so many years, would allow a chairman with a 1967 seniority date to take over and control the operators as he has done.

It would be my recommendation that you give this offer serious consideration and then let Lantz know how you feel as a body of men as this adversely effect [sic] the future welfare of you and your families.

I am extremely sorry the strike occurred as it has never been my intention to do anything to the older operators who have worked so many loyal years for Safeway Trials.

My best wishes to you and your families for a happy holiday season.

The above-mentioned letter was sent out over the signature of Walsh to those operators who had been in the service of the Respondent for many years. Prior to this letter, Walsh had sent a letter to Lantz (with copies to all employees, the Federal mediator, and the UTU International president) with a "complete contract document" and a summary of the "improvements made" therein, representing the Respondent's "final offer." In the earlier letter, Walsh stated his availability "to answer any questions you [Lantz] or the operators may have during the meantime." Walsh testified that his December 14 letter was a result of numerous calls from striking drivers, particularly calls from senior drivers.

On or about February 28, 1973,[8] Walsh was telephoned by Mrs. Sarah Stevens, the wife of a striking em-

8. We reaffirm our earlier conclusion that the statements of Paul Miller in January 1973, under all the circumstances involved therein, did not violate the Act. Further, we find that Miller was not in a position to state company policy, and therefore we shall not consider his statements in reaching our decision herein.

ployee. In their discussion of the labor problems, Walsh informed Mrs. Stevens that "I can tell you how it can be settled. I will meet with any three men on the roster other than John, John Lantz, and I will guarantee that I can have this contract settled within 2 to 3 hours."

In March 1973, Walsh, in a conversation with employee Kenneth Day, stated that he (Walsh) "couldn't understand why the men were letting John Lantz keep them in the streets and that he couldn't understand why they couldn't do something to get this thing settled, that the older men get together and do something to get this thing settled."

In March 1973, L. Hilton Warwick, the Company's vice president, in a conversation with striking employees at the Respondent's Philadelphia, Pennsylvania, terminal told the strikers that they were "following the wrong man" (i.e., referring to Lantz).[9]

In evaluating the Respondent's conduct and applying the test set forth by the court of appeals, we believe that it is essential to view the aforementioned incidents as a whole rather than individually. It is frequently the case that certain statements or conduct, in and of themselves, may not rise to being a violation of the Act. Where the issue, in essence, is whether or not the Respondent conducted an entire campaign to undermine and remove the Union's negotiator, we must examine all the conduct taken together, and examine it in light of the pre-10(b) conduct, in order to decide the lawfulness of the Respondent's statements and conduct.

9. In regard to Supervisor Sam Athey referring to Lantz as a "radical," we find that, although the Respondent may have been responsible for Athey's conduct, Athey was not in a position to state company policy, and therefore his remarks are not helpful in evaluating whether the Respondent's conduct was directed at undermining the Union's negotiator.

The Board has long held that it is permissible for an employer to communicate the provisions of bargaining offers to the membership of the unit and even to urge ratification of an offer submitted to the union negotiators.[10] However, having examined Respondent's entire course of action away from the bargaining table, we find that the Respondent's efforts here were not within the purview of permissible communications, but were directed to having the Union's representative replaced with someone more amenable to accepting the Respondent's proposals.

Treating the at-the-table bargaining negotiations as a neutral factor, language set out in a recent Board Decision becomes applicable to the facts herein. In *The General Athletic Products Company,* 227 NLRB No. 220 (1977), the Board affirmed a Decision of an Administrative Law Judge finding a violation where "the tack taken by this [r]espondent was to insist upon acceptance [of] its offer and no other by disparaging the [u]nion and by casting doubt in the minds of the membership as to the *bona fides* of the efforts of union representatives in advancing the interest of its membership, thus driving a wedge between union representatives whom it had previously invited to step aside from active negotiations and the employees on whose behalf they were negotiating."

In this case, the Respondent's efforts were similarly directed toward driving a wedge between the Union's chosen negotiator, John Lantz, and the union membership. Despite the Union's membership adhering to its support of Lantz, the Respondent insisted on continuing a campaign with numerous not-so-subtle suggestions that the presence of John Lantz as union negotiator was the primary reason that labor peace had not been reached and

10. See, e.g., *The Proctor & Gamble Manufacturing Company,* 160 NLRB 334 (1966); *N. L. R. B. v. Movie Star, Inc., Movie Star of Polarvill Inc.,* 361 F. 2d 346 (C. A. 5, 1966).

the men returned to work. It is well settled that, while an employer may communicate its offers to employees, an employer has no responsibility for determining or selecting who should bargain on behalf of employees.[11]

Based on the Respondent's statements and entire course of conduct away from the bargaining table, the conclusion is inescapable that the Respondent was attempting to undermine and subvert Lantz' authority as the bargaining representative of the motor coach operators. Time after time the Respondent, primarily through Walsh, reiterated its constant theme that Lantz' presence was preventing accord on a new agreement. For example, the Respondent told employees that (a) [referring to Lantz' bargaining in the August 24, 1972, letter] "this type of negotiating has gone on for too long and that time for action on your part is past due"; (b) he (Walsh) "can't negotiate with Lantz"; (c) he (Walsh) found it "very puzzling" that senior employees would allow Lantz to take over and control the operators; (d) a new contract could be "guarantee[d] . . . within 2 to 3 hours" if other men on the roster were to take over for Lantz; and (e) the "older men" should "get together and do something to get this thing settled." The message of such statements—evaluated in light of the Respondent's pre-10(b) conduct—adds up to an effort by the Respondent to destroy Lantz' credibility and to lead employees to replace Lantz. Nor is the Respondent's effort redeemed because the Respondent at times stated—as in the December 14, 1972, letter—that employees should "let Lantz know" about their position. The tenor of the Respondent's entire campaign belies an intent or desire to engage in good-faith bargaining with the employees' chosen representative, Lantz. Rather, it manifestly suggests that the Respondent's intent

11. See *Astro Electronics, Inc.*, 188 NLRB 572 (1971), enfd. 463 F. 2d 176 (C. A. 9, 1972).

was to rid itself of Lantz because he would not agree to the contract proposals offered by the Respondent. Thus, the Respondent's actions were wholly inconsistent with its statutory obligation to bargain in good faith.

Accordingly, having concluded that the Respondent's away-from-the-bargaining-table activities constituted a campaign to employees directed toward undermining the status and authority of John Lantz, the chosen bargaining representative of the employees, we find that bad faith and an 8(a)(5) violation have been established.[12]

Further, we find that the Respondent's unfair labor practices aggravated and prolonged the strike, thereby converting the economic strike herein into an unfair labor practice strike. The Respondent contends that there is no proof showing a causal connection between the unfair labor practices and the prolongation of the strike. The Respondent argues that the strike, which was concededly economic in its inception, remained an economic strike.

However, it is clear that the Respondent's actions—in seeking to undermine the union representative—were well known to employees and, according to Lantz' uncontradicted testimony, the Respondent's communications were discussed at various meetings of the union membership. Under these circumstances, the inference is clear that the Respondent's actions and communications served to aggravate and prolong the strike. The fact that the Respondent was not successful in undercutting Lantz does not negate our finding that the Respondent's misconduct was a concern to employees and a factor in the prolongation of the strike. Moreover, the very nature of the Respondent's misconduct—appealing directly to employees in an attempt

12. In his statement of position, the General Counsel addresses himself to various independent 8(a)(1) allegations in the complaint. In light of our Decision herein and as such matters were not included in the court's remand, we need not reconsider our original rulings on the independent 8(a)(1) allegations.

to undercut the union representative—is such as could not help but prevent and inhibit good-faith bargaining, thereby prolonging the strike.

Accordingly, we find that the Respondent's misconduct converted the economic strike herein into an unfair labor practice strike. In order not to rely on matters outside the 10(b) period, we shall date the conversion of the economic strike to an unfair labor practice strike as of August 24, 1972, the date of the initial misconduct on which we have relied in finding a violation of Section 8(a)(5).

Conclusions of Law

1. The Respondent is an employer engaged in commerce in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Transportation Union, Local No. 1699, is a labor organization within the meaning of Section 2(5) of the Act.

3. All motor coach operators, excluding office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, United Transportation Union, Local No. 1699, has been the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act for all of the Respondent's employees employed in the unit described above in paragraph 3.

5. Since on or about August 24, 1972, the Respondent, by seeking to undermine and subvert the authority of the Union's bargaining agent, has refused and continues to refuse to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its employees employed in the unit described in paragraph 3. Such action violates Section 8(a)(1) and (5) of the Act.

6. By the conduct set forth in paragraph 5, above, the Respondent has prolonged a strike of its employees.

7. The unfair labor practices recited above have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

We have found, contrary to the Administrative Law Judge, that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act. It is necessary, in order to effectuate the purposes of the Act, that the Respondent be ordered to cease and desist from engaging in such unlawful activity and to take other actions designed to effectuate the purposes and the policies of the Act.

It is the Board's established policy to require employers to reinstate unfair labor practice strikers within 5 days after said strikers make a full and unconditional offer to return to work. Accordingly, we shall include such a provision in our Order. Should the Respondent fail or refuse to grant such reinstatement, any striker who has made a full and unconditional offer to return to work will be entitled to backpay, computed as set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed thereon in the manner prescribed in *Florida Steel Corporation*, 231 NLRB No. 117 (1977),[13] beginning 5 days after such offer is made.[14]

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13. See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

14. Chairman Fanning, for reasons set out in his and Member Jenkins' partial dissent in *Drug Package Company, Inc.*, 228 NLRB No. 17 (1977), would commence backpay for the unfair labor practice strikers on the date they unconditionally offer to return to work.

Subsequent to the Board's initial Decision and Order in this case and pursuant to an RM petition filed by the Respondent on June 4, 1975, an election was held among the Respondent's motor coach drivers at the Respondent's facility on August 18, 1976. At that election, a majority of employees voted against the Union, and the Union thereby lost its certification.

When an election has been held, the Board normally, under the doctrine of *Irving Air Chute*,[15] does not grant a bargaining order unless there is a basis for setting aside the election. However, *Irving Air Chute* presupposes that it was appropriate to have conducted the election. Where, as here, the Board, after accepting a remand from a court, decides to reverse its dismissal of a complaint and find a violation of the Act, it must further decide whether, had it initially found a violation, an election would have been proper. In this case, had we found in our original Decision that the Respondent was in violation of Section 8(a)(5) of the Act, it is clear that the petition in Case 5—RM—777 would have been dismissed and no election held. Under these circumstances, we find it necessary to set aside the results of the election in Case 5—RM—777 and to issue a bargaining order to correct the violations found herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Safeway Trails, Inc., Washington, D. C., its officers, agents, successors, and assigns, shall:

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15. *Irving Air Chute Company, Inc., Marathon Division*, 149 NLRB 627 (1964).

1. Cease and desist from:

(a) Refusing to bargain in good faith with United Transportation Union, Local No. 1699, by engaging in activities with respect to its employees which are directed toward undermining the bargaining representative of those employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Upon request, bargain collectively with United Transportation Union, Local No. 1699, as the duly designated exclusive collective-bargaining representative of all its motor coach operators, excluding office clerical employees, guards, and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if understandings are reached, embody any such understanding in a written signed agreement.

(b) Within 5 days after their unconditional application for reemployment, offer to all striking employees reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, discharging if necessary any replacements, and make whole employees who have made such a request for reinstatement but who have not been offered reemployment for any loss of pay from the day beginning 5 days after the date of their unconditional offer to return to work and terminating on the date of the Respondent's offer of re-

instatement, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Post at its Washington, D. C., facility and all of its other terminals copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by an authorized representative of the Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the election held on August 18, 1976, in Case 5—RM—777 be, and it hereby is, set aside, and that Case 5—RM—777 be, and it hereby is, dismissed.

16. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D. C., December 9, 1977.

John H. Fanning, Chairman

John A. Penello, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain in good faith with United Transportation Union, Local No. 1699, by engaging in activities with respect to our employees which are directed toward undermining the bargaining representative of our employees.

WE WILL bargain, upon request, in good faith with United Transportation Union, Local No. 1699, as the exclusive collective-bargaining representative of all of our motor coach operators, and if an understanding is reached, we will embody the terms of said understanding in a signed agreement.

Within 5 days after their unconditional offer to return to work, WE WILL offer to all strikers who make such a request full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging if necessary any replacements who have been hired.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by the National Labor Relations Act.

SAFEWAY TRAILS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Edward A. Garmatz Federal Building, 101 West Lombard Street, Ninth Floor, Baltimore, Maryland 21201, Telephone 301-962-2772.

233 NLRB No. 171A

FPT
D—3592
Washington, D. C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 5—CA—5975

SAFEWAY TRAILS, INC.

and

UNITED TRANSPORTATION UNION, LOCAL NO. 1699

ORDER CLARIFYING SUPPLEMENTAL DECISION AND ORDER

On March 10, 1975, the Board issued a Decision and Order [1] in the above-entitled proceeding, dismissing *in toto* a complaint alleging that the Respondent had refused, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, to bargain collectively with the Charging Party, United Transportation Union, Local No. 1699 (hereinafter called the Union or the Charging Party).

On December 9, 1976, the United States Court of Appeals for the District of Columbia issued its decision,[2] remanding the case to the Board for reconsideration of its dismissal of that part of the complaint which alleged

1. 216 NLRB 951.

2. 546 F. 2d 1038.

that the Respondent had sought to undermine the bargaining representative status of the Union, thereby demonstrating that it had no intention of reaching an agreement with the Union.

After reconsideration, the Board, on December 9, 1977, issued a Supplemental Decision and Order [3] in the above-entitled proceeding in which it found that the Respondent had violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, by seeking to undermine and subvert the authority of the Union's bargaining agent and that the Respondent's 8(a)(1) and (5) violation had converted the economic strike of the Respondent's employees into an unfair labor practice strike.

Thereafter on December 22, 1977, the Charging Party filed a "Motion for Clarification of Board Remedy." On January 11, 1978, the Respondent filed an "Answer in Opposition to Charging Party's Motion for Clarification of Board Remedy." On February 24, 1978, the Charging Party filed a "Reply to Respondent's Answer to Charging Party's Motion for Clarification of the Remedy." Finally, on March 9, 1978, the Respondent filed a "Supplemental Answer in Opposition to Charging Party's Motion for Clarification of Board Remedy."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In order to remedy the unfair labor practices found, the Board's Supplemental Decision and Order required, in paragraph 2(b), that the Respondent take the following affirmative action:

> Within 5 days after their unconditional application for reemployment, offer to all striking employees

3. 233 NLRB No. 171.

reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, discharging if necessary any replacements, and make whole employees who have made such a request for reinstatement but who have not been offered reemployment for any loss of pay from the day beginning 5 days after the date of their unconditional offer to return to work and terminating on the date of the Respondent's offer of reinstatement, in the manner set forth in the section of this Decision entitled "The Remedy."

In its motion, the Charging Party requests that the Board reaffirm its finding in Case 5—RM—777 [4] that the Charging Party, on March 12, 1975, made an unconditional offer to return to work on behalf of all striking employees. The Charging Party further urges that the March 12, 1975, date relate to the remedy of reinstatement and backpay so that it will be found—in regard to paragraph 2(b) of our Order—that the striking employees satisfied their obligation to make unconditional application for reemployment on March 12, 1975.

In its answer, the Respondent, while not disputing that the Charging Party ended its strike action and made application on behalf of all strikers to return to work on March 12, 1975, contends that the Board's Order must be prospective in nature and that backpay should accrue only for periods after the Board's Supplemental Decision and Order of December 9, 1977. Relying on *Ferrell-Hicks Chevrolet, Inc.*, 160 NLRB 1692 (1966), the Respondent argues that this is one of those "occasional cases" with

4. See 224 NLRB 1342 (1976). The proceedings in Case 5—RM—777 were vacated and the petition dismissed in our Supplemental Decision in this case.

"special factors" warranting the tolling of backpay. The Respondent further states that subsequent to the Board's original Decision and Order of March 10, 1975, it sent letters to all strikers (with the exception of six who allegedly had engaged in misconduct) inquiring of their availability and desire for recall. Thereafter, according to the Respondent, it placed those seeking recall on a preferential hiring list and eventually extended the offers of reemployment to approximately 184 strikers, about 100 of whom accepted. The Respondent requests that the Board find that approximately 44 strikers who did not respond to its inquiry as to availability for recall be held no longer entitled to receive offers of reinstatement.

In *Ferrell-Hicks*, the Board stated that it would consider sympathetically requests by respondents for a less-than-full backpay award when the equities indicated that such would effectuate the purposes of the Act. However, in the case before us, we cannot conclude that a tolling of backpay would be appropriate.

In this case, the Respondent has not received an adverse decision because of a major change of Board doctrine or law. Rather, as we stated in our Supplemental Decision and Order, we reconsidered this case based on the conclusion of the court of appeals that the General Counsel, in the original hearing, had not conceded that the Respondent's at-the-table bargaining had been in good faith. Thus, the different result reached in our Supplemental Decision was not based on the Board's failure to adhere to past precedent but on a reevaluation (after eliminating consideration of the at-the-table bargaining) of the evidence. In this situation, where an adverse decision has resulted from a reappraisal of the evidence, a respondent must normally bear the burden inherent in litigation—that after extended litigation, an earlier favorable decision will be reversed and an adverse decision issue.

Nor do we find that the equities herein dictate that backpay be tolled. Upon reconsideration, we concluded—in our Supplemental Decision—that the Respondent conducted a lengthy campaign aimed at undermining and subverting the Union. That campaign resulted in an economic strike being converted to an unfair labor practice strike. With the possible exception of 6 out of over 200 strikers, there is no allegation of striker misconduct. Under these circumstances, where unfair labor practice strikers have made an unconditional application to return and have engaged in no misconduct, we find that the equities favor a full backpay remedy for strikers not properly reinstated.[5] As we stated in *Ferrell-Hicks*, once a final determination has been made that a respondent has engaged in wrongdoing, a full backpay award will be presumptively appropriate. Here, neither the fact that our Supplemental Decision reached a different conclusion from our original Decision nor the equitable considerations involved are sufficient to overcome the presumption favoring a full backpay award. Accordingly, we conclude that it will effectuate the purposes of the Act to award full backpay to strikers, beginning 5 days after their unconditional offer to return on March 12, 1975.[6]

The Respondent further has contended that certain strikers are not entitled to reinstatement offers because they did not respond to its inquiries as to availability in March 1975. In this regard, the Respondent's argument appears primarily to be that it has already fulfilled its obligation to make reinstatement offers. We shall leave to the compliance stage of this proceeding a determination as to whether the Respondent has previously made valid reinstatement offers that would satisfy its obligations under our Supplemental Decision and Order.

5. Neither *Fibreboard Paper Products Corporation*, 138 NLRB 550 (1962), nor *Kohler Co.*, 148 NLRB 1434 (1964), cited by the Respondent, mandate that backpay be tolled here.

Fibreboard, unlike this case, involved a significant Board decision in an unsettled area of law—finding an employer had a duty to bargain about a decision to contract out the work of an entire bargaining unit. As noted heretofore, the Board's Supplemental Decision in this case resulted from a reappraisal of the evidence rather than from a major change or new innovation in the law.

In *Kohler*, the respondent's refusal to reinstate was based on the serious matter of striker misconduct. After a court remand, the Board applied the *Thayer* doctrine (see *N. L. R. B. v. Thayer Company and H. N. Thayer*, 213 F. 2d 748 C. A. 1, 1954) to determine whether certain strikers who had engaged in misconduct were nonetheless entitled to reinstatement. *Thayer* mandated a weighing of an employer's unfair labor practices against the strikers' unprotected acts of misconduct in determining whether reinstatement was an appropriate remedy. Where the refusal to reinstate was based on misconduct that did in fact occur but reinstatement was later ordered, after reconsideration of the case, for certain strikers on the basis that the employer's unfair labor practices outweighed the strikers' misconduct, the equities favored the tolling of backpay. Here, except for an allegation regarding 6 of over 200 strikers, there is no striker misconduct involved. Thus, the equities favor the unfair labor practice strikers who, having engaged in no misconduct, applied for reinstatement. Reliance on a Board decision which is later reversed upon a reappraisal of the evidence does not shift the equities to the same extent which occurs when reliance is placed on striker misconduct later found, upon reconsideration of the case, insufficient to bar reinstatement.

6. Chairman Fanning would commence backpay for the unfair labor practice strikers on March 12, 1975, the date on which they unconditionally offered to return to work.

ORDER

It is hereby ordered that the Board's Supplemental Decision and Order in this matter be, and it hereby is, clarified to provide in a footnote (to be designated fn. 16 and the subsequent footnote renumbered accordingly) to paragraph 2(b) of the Order as follows:

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16. The Board found in Case 5—RM—777 (see *Safeway Trails*, 224 NLRB 1342), that the Union advised the Employer (the Respondent herein) on March 12, 1975, that it was terminating the strike action and making an unconditional offer to return to work on behalf of the striking operators. Our Order in paragraph 2(b) refers to an unconditional offer for reemployment whenever made, and we do not find it appropriate, under the circumstances of this case, to make our order prospective or to toll backpay. Accordingly, the March 12, 1975, date shall serve as the date upon which all striking employees satisfied their obligation under our Order to make an unconditional offer to return, and the remedy of reinstatement and backpay will relate to that date. Other contentions and questions regarding the reinstatement obligation and backpay may best be dealt with in the compliance phase of these proceedings.

Dated, Washington, D. C., March 31, 1978

John H. Fanning, Chairman

John A. Penello, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1155

SAFEWAY TRAILS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

UNITED TRANSPORTATION UNION, INTERVENOR

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Argued March 16, 1979

Decided September 18, 1979

(Judgment entered this date)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

John H. Leddy, for petitioner.

Jay E. Shanklin, Attorney, National Labor Relations Board, with whom *John S. Irving,* General Counsel, *Robert E. Allen,* Acting Associate General Counsel and *Elliott Moore,* Deputy Associate General Counsel, National Labor Relations Board, were on the brief, for respondent.

Edward D. Friedman, with whom *Jacob I. Karro* was on the brief, for intervenor.

Before LEVENTHAL and ROBINSON, *Circuit Judges,* and VAN DUSEN,* *Senior Circuit Judge,* United States Court of Appeals for the Third Circuit.

Opinion for the court *per curiam.*

PER CURIAM: Safeway Trails, Inc. ("the Company") has petitioned this court for review of an order of the National Labor Relations Board ("NLRB" or "Board").[1] The Board found that the Company had violated Section 8(a)(5) of the National Labor Relations Act[2] by failing to bargain in good faith. Specifically, the Board found that the Company had attempted to "undermine and subvert" the authority of the employees' chief bargaining representative, John Lantz.[3] We affirm.

BACKGROUND

The Company is the operator of an interstate motor coach system. For more than thirty-five years, the United Transportation Union (UTU) has represented the Company's motor coach operators. The most recent contract ran from April 1, 1969 to March 31, 1972. In February of 1972, UTU and the Company began negotiating a new contract, but reached no agreement before the old contract expired. On April 2, 1972, the motor coach operators went out on strike. On January 13, 1973, with the operators still on strike, the Company resumed operations after informing its striking employees of its intent to do so. The strike ended on March 12, 1975, when UTU notified the Company that it was terminating the strike and making an unconditional offer to return to work. During this entire period, the union's chief negotiator was its general chairman, John Lantz.

In April of 1973, UTU filed a complaint alleging violations of Section 8(a)(5). Following extensive hearings, an administrative law judge (ALJ) recommended that the complaint be dismissed. Although he recognized that the Company had engaged in actions that tended to undermine the authority of the union's bargaining representative, the ALJ stated that the Board's General Counsel had conceded that bargaining was conducted in good faith. Such a concession would, of course, preclude a finding of an 8(a)(5) violation. The Board affirmed the ALJ's findings and accepted his recommendation that the complaint be dismissed.

UTU petitioned this court for review of the Board's dismissal of the complaint. A panel of this court determined that there was no evidence to support the finding that the General Counsel had conceded good faith bargaining on the part of the Company.[4] Additionally, the court determined that the Board's failure to consider the Company's away-from-bargaining-table actions as evi-

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* Sitting by designation pursuant to 28 U. S. C. 294(d).

1. *Safeway Trails, Inc.,* 233 NLRB No. 171, 96 LRRM 1614 (1977).

2. 29 U. S. C. § 158(a)(5) (1976).

3. 96 LRRM at 1618.

4. United Transportation Union Local 1699 v. NLRB, 178 U. S. App. D. C. 272, 274, 546 F. 2d 1038, 1040 (1976).

dence of bad faith constituted a departure from previous Board policy,[5] and remanded the case to the Board.[6]

On remand, the Board reviewed the evidence and determined that the Company had attempted to undermine Lantz's authority.[7] The Board also stated that even though a party engaged in the at-the-table formalities of collective bargaining, bad faith sufficient to constitute an 8(a)(5) violation could be established on the basis of the away-from-the-table behavior.[8] We have reviewed this opinion and conclude that it is supported by substantial evidence and should be affirmed.

Discussion

In *General Electric Company*[9] the Board held that it violated the obligation to bargain in good faith

> for an employer to mount a campaign . . . for the purpose of disparaging and discrediting the statutory representative in the eyes of its employee constituents, to seek to persuade the employees to exert pressure on the representative to submit to the will of the employer, and to create the impression that the employer rather than the union is the true protector of the employees' interests.

5. *Id.* at 275, 546 F. 2d at 1041. In particular, the court was concerned with the Board's decision in General Electric Co., 150 NLRB 192 (1964), *enforced*, 418 F. 2d 736 (2d Cir. 1969), *cert. denied*, 397 U. S. 965 (1970). According to the court, *General Electric* held that if an employer's away-from-the-bargaining-table activities are directed toward undermining the bargaining representative of the employees, bad faith and a Section 8(a)(5) violation are established even though overt evidence of that bad faith does not appear at the bargaining table itself. The court felt that by confirming the ALJ's decision that some at-the-table evidence of bad faith must be introduced to make out an 8(a)(5) violation, the Board had "impermissibly 'backed into' a change of the law." *See* Greater Boston Television Corp. v. FCC, 143 U. S. App. D. C. 383, 394, 444 F. 2d 841, 852 (1970), *cert. denied*, 403 U. S. 923 (1971).

6. 178 U. S. App. D. C. at 275, 546 F. 2d at 1041.

7. 96 LRRM at 1618.

8. *Id.* at 1615.

9. 150 NLRB 192, 194-95 (1964), *enforced*, 418 F. 2d 736, 756-57 (2d Cir. 1969), *cert. denied*, 397 U. S. 965 (1970).

The evidence in this case clearly establishes that the Company engaged in this prohibited conduct.

For example, at a bargaining session on August 22, 1972, the Company presented a contract proposal to the Union, requesting that it be presented to the employees. Determining that the offer was not very different from a previous offer rejected by the membership, the union decided not to present it to the employees and so informed the Company on August 23. Even though another bargaining session was scheduled for August 28, on August 24, the Company sent copies of the contract to the employees. Attached to the contract was a letter blaming Lantz for the failure to reach an agreement. The letter told the employees that "the time for action . . . . is past due" and that each employee should "act in the interest of [his] own personal welfare and aid in getting an early settlement."[10]

On December 7, 1972, the Company sent Lantz a letter and a "complete contract document," stating that it was the Company's "final offer." Copies of the letter and the contract were sent to all the employees. One week later, the Company sent a follow-up letter to twenty-six senior striking employees. The letter noted that it was "very puzzling" why "operators, who have been with this Company so many years, would allow a chairman with a 1967 seniority date to take over and control the operators as he [Lantz] has done." It also suggested that the

10. 96 LRRM at 1617.

operators give the contract offer "serious consideration and then let Lantz know how you feel as a body of men." [11]

On February 28, 1973, after the Company had resumed operations, but while the strike still continued, the Company's president spoke with the wife of a striking employee. The president said "I can tell you how it [the strike] can be settled. I will meet with any three men on the roster other than John [Lantz], and I will guarantee that I can have this contract settled within two to three hours." [12]

In March, 1973, in a conversation with one of the more senior operators, the Company's president stated that he "couldn't understand why they couldn't do something to get this thing settled, that the older men get together and do something to get this thing settled." [13] During that same month, the Company's vice president told striking employees that they were "following the wrong man" (i.e., Lantz).[14]

Faced with this evidence, the Company argues that its communications with its employees cannot be used to establish overall bad faith because the Company was charged only with committing independent per se violations of Section 8(a)(5). This argument was disposed of by this court's earlier opinion in this case, which characterized the complaint as alleging "an overall bad faith charge." [15] Indeed, such a finding was a necessary predicate for that panel's remand order.

The Company also argues that since its statements to the employees did not contain a "threat of reprisal or force

11. *Id.*

12. *Id.* at 1617-18.

13. *Id.* at 1618.

14. *Id.*

15. 178 U. S. App. D. C. at 274, 546 F. 2d at 1040.

or promise of benefit," it violates Section 8(c) of the Act [16] to use the statements as evidence of an 8(a)(5) violation. The purpose of Section 8(c) "was hardly to eliminate all communications from the Board's purview, for to do so would be to emasculate a statute whose structure depends heavily on evaluation of motive and intent." [17] The section resulted from the Board's practice of inferring the existence of an unfair labor practice from a totally unrelated speech or opinion delivered by an employer.[18] Its purpose "was to impose a rule of relevancy on the Board in evaluating the legality of statements by parties to a labor dispute." [19]

In the case before us, the employer's communications are more than evidence of an unfair labor practice; they are the unfair labor practice itself. It defies logic and good sense to suggest that such statements are beyond the purview of the Board.

THE BOARD'S REMEDY.

The Board ordered that the Company pay the striking employees backpay from March 17, 1975, five days after their unconditional offer to return to work. Citing *Fibreboard Paper Products Corporation,*[20] the Company argues

16. 29 U. S. C. § 158(c) (1976) provides:

> (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

17. NLRB v. General Electric Co., 418 F. 2d 736, 761 (2d Cir. 1969), *cert. denied,* 397 U. S. 965 (1970).

18. *Id.* at 760. *See also* I Legislative History of the LMRA 1947, at 1541.

19. 418 F. 2d at 760.

20. 138 NLRB 550 (1962).

that the backpay award should be tolled to the date of the Board's decision finding an 8(a)(5) violation.

The instant case is clearly distinguishable from *Fibreboard*. Between the Board's two decisions in *Fibreboard*, the NLRB established a new policy regarding the duty to bargain over subcontract work. By contrast, there was no new policy in this case. Indeed, this court's remand order was premised on the Board's departure from the existing policy of *General Electric*.

There is a need for tolling backpay awards where there are "special factors" which make such awards unfair.[21] But one cannot toll from the date of a decision of the Board merely because it is on the books until it is reconsidered by the Board and modified. No opinion is "the law of the case" if it is duly reconsidered or appealed and changed. This is not a case where the employer has taken action in reliance on any pending decision. Someone must bear the burdens resulting from the employer's illegal actions. The Board was within its sound discretion in providing that the burden of the loss should fall on the employer rather than on the employees.

Affirmed.

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21. NLRB v. R. J. Smith Construction Co., 178 U. S. App. D. C. 109, 114, 545 F. 2d 187, 192 (1976).

No. 79-741

In the Supreme Court of the United States

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SAFEWAY TRAILS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A87-A94) is not yet reported. The supplemental decision and order of the National Labor Relations Board (Pet. App. A58-A86) are reported at 233 N.L.R.B. 1075. The Board's initial decision (Pet. App. A1-A51) is reported at 216 N.L.R.B. 951; that of the court of appeals (Pet. App. A52-A57) is reported at 546 F.2d 1038.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1977. The petition for a writ of certiorari was filed on November 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that petitioner failed to bargain in good faith with the union by seeking to undermine the authority of the union's bargaining agent.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 3-4. Also relevant is Section 8(a)(1), 29 U.S.C. 158(a)(1):

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

STATEMENT

1. On March 31, 1972, the collective bargaining agreement between petitioner (herein "the Company") and the Union[1] expired. The parties had been negotiating for a new agreement, but none was

[1] United Transportation Union, Local 1699.

reached and the employees went on strike on April 2, 1972. Bargaining sessions continued; the Company was represented by its president, Marvin Walsh, and the Union by its chairman John Lantz. (Pet. App. A61; Tr. 31-33, 237, 533-534, 544, 581-582.)[2]

Shortly after the strike began, Walsh wrote a letter to all employees stating that most of the negotiating meetings had been "meaningless, or at least fruitless, because [Lantz] was not prepared, did not have his full committee, and met either by himself or with one member most of the time [and] insisted upon ridiculous demands * * * which made it impossible to reach an agreement." (Pet. App. A62; A. 33a-34a.) About a month later, on May 4, 1972, Walsh wrote to a federal mediator (with copies to the employees and the Union's international president and vice president) stating that Lantz lacked "responsibility and sincerity [and that it was] high time the UTU grand lodge assume[d] its responsibility for the people they represent * * *" (Pet. App. A62; A. 35a). The following week, Walsh again wrote to the employees, accusing Lantz of misrepresenting facts to them (Pet. App. A62; A. 65a). And in June 1972, Walsh telephoned a former president of the Union complaining of Lantz's conduct of the negotiations (Pet. App. A62; Tr. 103-104).

Meanwhile, an internal company memorandum evaluating the April 28, 1972, negotiating meeting

[2] "Tr." refers to the transcript of the hearing before the administrative law judge. "A." refers to the printed appendix in the court of appeals.

stated that there was "no possibility of settling a contract with Lantz" and outlined "three possibilities":

> (1) Inform the membership and the employees of the absolute irresponsibility of their representation in an effort to get them to boot Lantz out.
>
> (2) The UTU International taking over these negotiations and putting in someone who can intelligently negotiate and reach an agreement.
>
> (3) Failing to achieve Nos. 1 and 2, appears that this will be a long work stoppage with the definite possibilities of having to put this company back to work without a settlement with the UTU.

(Pet. App. A63; A. 48a-49a).

In August 1972, following a Union decision not to submit a contract proposal by the Company to the membership, Walsh sent a letter to the employees criticizing Lantz for that decision, and charging that no contract agreement had been reached "principally because [Lantz] has consistently made more and more demands that we cannot possibly accede to, and * * * won't approve for the record those issues which we have agreed upon"; Walsh urged the employees that "time for action on your part is past due." The letter went on to argue that the Company's proposal should be accepted, and expressed the "hope that each of you will act in the interest of your own personal welfare and aid in getting an early settlement of this strike" (Pet. App. A64-A66; A. 38a-40a).

In October 1972, Walsh telephoned an employee and told him that he was having a "rough time" bargaining with Lantz and further asserted something to the effect that "I can't negotiate with Lantz" (Pet. App. A66; Tr. 75-76).

In December 1972, Walsh wrote to 26 senior striking employees, defending the Company's most recent contract offer, stating that "[i]t is very puzzling to me why the operators, who have been with this company so many years, would allow a chairman [Lantz] with a 1967 seniority date to take over and control the operators as he has done" (Pet. App. A66-A67; A. 25a).

In February 1973, Walsh told the wife of a striking employee that if he could "meet with any three men on the roster other than John, John Lantz, * * * I will guarantee that I can have this contract settled within 2 to 3 hours" (Pet. App. A67-A68; Tr. 44-45).

In March 1973, Walsh told another employee that he "couldn't understand why the men were letting John Lantz keep them in the streets and that he couldn't understand why they couldn't do something to get this thing settled, that the older men [could] get together and do something to get this thing settled" (Pet. App. A68; Tr. 182). That same month, the Company's vice president told strikers that they were "following the wrong man" (Pet. App. A68; Tr. 80).

The strike ended in March 1975 (Pet. App. A61). A decertification election was held among the Com-

pany's employees in 1976, and the Union lost its representative status. *Safeway Trails, Inc.*, 224 N.L.R.B. 1342 (1976).

2. In its supplemental decision, the Board concluded, contrary to its prior decision,[3] that the Company's course of conduct away from the bargaining table constituted a campaign intended to undermine support for the Union bargaining agent Lantz among the employees (Pet. App. A69). After examining the Company's entire course of action away from the bargaining table, the Board determined that the Company's "efforts here were not within the purview of permissible communications, but were directed to having the Union's representative replaced with someone more amenable to accepting the Company's proposals" (Pet. App. A69). The Board found that the Company had attempted to "driv[e] a wedge between the

[3] In its original decision the Board, affirming the administrative law judge, dismissed the complaint (Pet. App. A2). The law judge held that the General Counsel had conceded that the Company's at-the-table bargaining was conducted in good faith (Pet. App. A8), and that therefore there was " 'no basis for concluding on the strength alone of the [Company's] statements away from the bargaining table that its otherwise lawful bargaining conduct was converted into a violation of section 8(a)(5).' " (Pet. App. A50.)

The court of appeals vacated the Board's dismissal order, finding that the General Counsel had not made any such concession (Pet. App. A54), but had merely eschewed reliance on the Company's at-the-table conduct to prove a violation of Section 8(a)(5) (Pet. App. A54-A55). The court remanded the case to the Board for a determination whether the behavior described above was sufficient, in the absence of at-the-table evidence, to establish a violation of petitioner's duty to bargain in good faith (Pet. App. A56-A57).

Union's chosen negotiator, John Lantz, and the Union membership [by] continuing a campaign with numerous not-so-subtle suggestions that the presence of John Lantz as union negotiator was the primary reason that labor peace had not been reached" (Pet. App. A69). The Board concluded that the Company's conduct constituted bad faith and a violation of Section 8(a)(5) and (1) (Pet. App. A70-A72).[4]

3. The court of appeals, per curiam, affirmed the Board's decision and enforced its order (Pet. App. A87-A94).

Relying on *General Electric Co.*, 150 N.L.R.B. 192, 194-195 (1964), enforced, 418 F.2d 736, 756-757 (2d Cir. 1969), cert. denied, 397 U.S. 965 (1970), the court noted that it is a violation of the Act for an employer to seek to discredit the bargaining representative in the eyes of the employees (Pet. App. A90-A91). The court concluded that petitioner "engaged in this prohibited conduct" (Pet. App. A91).

The court also rejected petitioner's argument that Section 8(c) of the Act precluded the unfair labor practice finding, explaining that the purpose of the "free speech" provision of the Act

[4] The Board further determined that these unfair labor practices "aggravated and prolonged the strike, thereby converting the economic strike herein into an unfair labor practice strike" (Pet. App. A71), thus entitling the strikers to reinstatement and backpay from the date of their March 1975 offers to return to work (Pet. App. A73, A86). Furthermore, the Board concluded that the decertification election should not have been held due to the unfair labor practices, set aside the result of that election, and issued a bargaining order (Pet. App. A74).

"was hardly to eliminate all communications from the Board's purview, for to do so would be to emasculate a statute whose structure depends heavily on evaluation of motive and intent." The section resulted from the Board's practice of inferring the existence of an unfair labor practice from a totally unrelated speech or opinion delivered by an employer. Its purpose "was to impose a rule of relevancy on the Board in evaluating the legality of statements by parties to a labor dispute."

In the case before us, the employer's communications are more than evidence of an unfair labor practice; they are the unfair labor practice itself. [Pet. App. A93; footnotes omitted.]

ARGUMENT

The decision of the court of appeals is correct. There is no conflict among the circuits or with this Court, and further review is unwarranted.

1. Petitioner urges that its conduct "represented nothing more than an expression of [its] view of the negotiations and its view of the reasons for the stalemate" (Pet. 14); and, as such, is within the ambit of *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960) (Pet. 10-13), and is protected by Section 8(c) of the Act (Pet. 13-15). However, the Board, upheld by the court of appeals, found that the Company was not merely expressing its views to the employees—which, as the Company correctly

states, it would have been entitled to do[5]—but was engaged in a campaign to discredit the Union's negotiator in the eyes of the employees in order to cause them to replace him with someone more amenable to the Company's proposals.

There is no merit to the Company's contention (Pet. 10-13) that *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477 (1960), holds that away-from-the-table conduct, standing alone, cannot constitute bad faith bargaining. There the Court held that a union's lawful, though unprotected, economic activity to support its bargaining demands could not be the basis for a finding of bad faith bargaining "unless there is some specific warrant for its condemnation

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[5] See, *e.g.*, *Proctor & Gamble Mfg. Co.*, 160 N.L.R.B. 334, 340 (1966) (Pet. 9, 14), where the Board found that the employer's criticism of the union's bargaining conduct was not violative of the Act. The Board explained that the employer's communications were not "motivated" or "designed to subvert employee choice of a bargaining representative, and hence were permissible here." Conduct which is so motivated, however, is violative of the Act. See *General Electric Co., supra; Kellwood Co.* v. *NLRB*, 434 F.2d 1069, 1073-1074 (8th Cir. 1970), cert. denied, 401 U.S. 1009 (1971); *General Athletic Products Co.*, 227 N.L.R.B. 1565, 1575 (1977). *Wantagh Auto Sales, Inc.*, 177 N.L.R.B. 150, 154 (1969), and *Stokely-Van Camp, Inc.*, 186 N.L.R.B. 440, 450 (1970) (Pet. 14), are inapposite. In those cases the Board rejected, as a factual matter, allegations that employers had interfered with their employees' choice of representative. Similarly, in *NLRB* v. *Movie Star, Inc.*, 361 F.2d 346, 349 (5th Cir. 1966) (Pet. 9), the court approved an employer's direct plea to employees to accept its final contract offer, rejecting the contention that the plea amounted to an attempt to bargain directly with the employees.

of the precise tactics involved * * *" (*id.* at 490). Here, contrary to *Insurance Agents'*, there was "specific warrant for condemnation" of the Company's tactics, for, contrary to the Company's assertion, its statements were not mere expressions of its views, but an attempt to drive a wedge between the Union bargaining committee and the employees. Such conduct interferes with the fundamental right of employee self-organization and consequently is conduct which the Act condemns. *NLRB* v. *General Electric Co., supra,* 418 F.2d at 756-757; cf. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617 (1969). As the court of appeals stated (Pet. App. A93): "It defies logic and good sense to suggest that such statements are beyond the purview of the Board." Accord, *Kellwood Co.* v. *NLRB, supra,* page 9 note 5.

The Company's argument (Pet. 13-15) that Section 8(c)[6] precludes the Board's finding here fails for the same reason. Thus, the Company relies on *NLRB* v. *General Electric Co., supra,* 418 F.2d at 755-756 (Pet. 15), for the proposition that "[i]n circumstances such as these, the interests of free speech and informed choice must prevail over the slight possibility that the representatives' positions might be undermined." The circumstances to which the court in

[6] Section 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expressions contains no threat of reprisal or force or promise of benefit.

General Electric referred, however, are those where the statements at issue do not have "anything more than an informational purpose," not those where the company attempts "to reach a separate settlement with the local," in derogation of the representative status of the international union. Here, as both the Board (Pet. App. A70) and the court of appeals (Pet. App. A91) found, petitioner's course of conduct, which was designed to undermine the Union representative's position, fell on the forbidden side of the fence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR THE UNITED TRANSPORTATION UNION IN OPPOSITION

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MEMORANDUM FOR THE UNITED TRANSPORTATION UNION IN OPPOSITION

STATEMENT

The United Transportation Union, Intervenor, joins with the National Labor Relations Board, Respondent, in requesting that this Court deny the petition for a writ of certiorari, seeking review of the decision of the Court of Appeals for the District of Columbia Circuit in this case.

REASONS FOR DENYING THE WRIT

The petition presents no conflict with any decision of any United States Court of Appeals or of this Court and raises no important question of federal law appropriate for review by this Court. The case involves no more than a question of fact, whether the Court of Appeals was correct in sustaining the findings of the Board upon the record taken as a whole—clearly no basis for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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